No. 244

IN THE

United States Supreme Court

OCTOBER TERM 1924 1925

ALABAMA & VICKSBURG RAILWAY COMPANY, ET ALS.,

Petitioners,

versus

JACKSON & EASTERN RAILWAY COMPANY.

NOTICE, MOTION AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

ALABAMA & VICKSBURG RAILWAY COMPANY, ET ALS., PETITIONERS.

R. H. THOMPSON,
A. S. BOZEMAN,
S. L. McLAURIN,
MONTE M. LEMANN,
J. BLANC MONROE,
Counsel for Petitioners.

March, 1925.

Hauser Ptg. Co., "The Legal Printers," 720 Poydras St., New Orleans.

UNITED STATES FIDELITY & GUARANTY COMPANY.
By R. H. THOMPSON,
A. S. BOZEMAN,
S. L. McLAURIN,
MONTE M. LEMANN,
J. BLANC MONROE,
Counsel for Petitioners.

The foregoing notice and delivery of a copy thereof and of the motion and petition for writ of *certiorari* and brief in support thereof are hereby acknowledged this 22nd day of February, 1925.

NEVILLE & STONE,
GEO. B. NEVILLE,
Attorneys for J. & E. Ry. Co.

IN THE

United States Supreme Court

OCTOBER TERM 1924

ALABAMA & VICKSBURG RAILWAY COMPANY, ET ALS.,

Petitioners,

versus

JACKSON & EASTERN RAILWAY COMPANY.

MOTION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

ALABAMA & VICKSBURG RAILWAY COMPANY, ET ALS.,

Petitioners.

Now come The Alabama & Vicksburg Railway Company, the Canal-Commercial Trust & Savings Bank of New Orleans, Felix E. Gunter, and the United States Fidelity and Guaranty Company, petitioners, by their Counsel, and move this Honorable Court that it shall, by *certiorari* or other proper process directed to the Honorable the Judges of the Supreme Court of the State

of Mississippi, require said Court to certify to this Court, for its review and determination, a certain cause in said Supreme Court of Mississippi lately pending wherein the petitioner, Alabama & Vicksburg Railway Company, Canal-Commercial Trust & Savings Bank of New Orleans, and Felix E. Gunter, were appellants and the said JACKSON & EASTERN RAILWAY COMPANY was appellee, and to that end they now tender herewith their petition and brief, with a certified copy of the entire record in the said cause in the said Supreme Court of Mississippi.

R. H. THOMPSON,
A. S. BOZEMAN,
S. L. McLAURIN,
MONTE M. LEMANN,
J. BLANC MONROE,
Counsel for Petitioners.

IN THE

United States Supreme Court

OCTOBER TERM 1924.

ALABAMA & VICKSBURG RAILWAY COMPANY, ET AL.,

Petitioners,

versus

JACKSON & EASTERN RAILWAY COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of the Alabama & Vicksburg Railway Company and of the Canal-Commercial Trust & Savings Bank of New Orleans and Felix E. Gunter (they being Trustees of a certain mortgage and deed of trust of said Alabama & Vicksburg Railway Company), Plaintiffs in Error, and the United States Fidelity & Guaranty Company, Surety on the Appeal Bond in the Supreme Court of the State of Mississippi, respectfully shows to this

Honorable Court, that your petitioner, the Alabama & Vicksburg Railway Company, is a standard Class 1 Railroad, owning and operating a standard line of railroad whereon it is engaged continuously in the transportation of interstate and intrastate passengers, freight, express and mail, it being one of the old, well-established and important carriers in the southeast of the United States.

That the Jackson & Eastern Railway Company is a comparatively new, unimportant and small railroad company incorporated in 1915, for the purpose of owning and operating a railroad from Union, Mississippi, to Jackson, Mississippi, a large part of which prospective line is still unbuilt. That the said Jackson & Eastern Railway Company is also engaged in interstate and intrastate commerce.

That in February, 1902, when the line of the Jackson & Eastern Railway Company had been constructed only from Union, Mississippi, to Sebastopol, Mississippi, a town about forty miles from a point on petitioner's railroad called Curan's Crossing, the Jackson & Eastern Railway Company filed a petition (see copy in the record) with the Circuit Clerk of Rankin County, Mississippi, seeking to condemn property of your petitioners at Curan's Crossing, described in the said petition as follows:

> "3. That the following **real property**, rights, privileges and easements are sought to be condemned, for the purposes hereinafter stated, to-wit: **A strip of land of varying widths**, extending from Station 0/00 on the survey enumeration of the applicant, the Jackson & Eastern Railway Company, which 0/00 station is located on the center line of the Alabama & Vicksburg Railway

Company's track 1797 feet east from the first block signal semaphore east of the Alabama & Vicksburg Railway Company's bridge over Pearl River in an easterly direction along the surveyed line of the Jackson & Eastern Railway Company an average distance of 325 feet, the widths of said strip to be condemned are: At Station 0/00, 16 feet, being 8 feet on each side of the center line; at Station 0/50, 21 feet, being 8 feet on the right and 13 feet on the left side of the center line of the Jackson & Eastern Railway Company's survey; at Station 1/00, 26 feet, being 8 feet on the right and 18 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 1/50, 27 feet wide, being 9 feet on the right and 18 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 2/00, 30 feet wide, being 11 feet on the right and 19 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 2/50, 35 feet wide, being 15 feet on the right and 20 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 3/00, 30 feet wide, being 20 feet on the right and 10 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 3/25, 20 feet wide, being all on the right of the center line of the Jackson & Eastern Railway Company's survey; and at Station 3/75 coming to a point on the north right of way line of the Alabama & Vicksburg Railway Company's said survey, **containing two hundred and thirty-two thousandths (.232) acres**, and lies in the NE¼ of the NW¼, Section 14, Township 5, North Range East, Rankin County, Mississippi, which said center line of the proposed track of the applicant, the Jackson & Eastern Railway Company is more fully shown by a diagram hereto attached, marked Exhibit "A", and made a part hereof. (R. of Miss. S. C. 28, 385.)

"4. Your applicant would further show that the public use for which the strip of land, rights, privileges and easements hereinabove described, is for a right of way for a switch track and the connection of said switch with the main line of the

> defendant, the Alabama & Vicksburg Railway Company at the point above described; and your applicant further shows that it is necessary for it to OWN, OCCUPY AND USE said strip of land, rights, privileges and easements above described, in order properly to conduct its business as a common carrier, for which purpose it was organized."

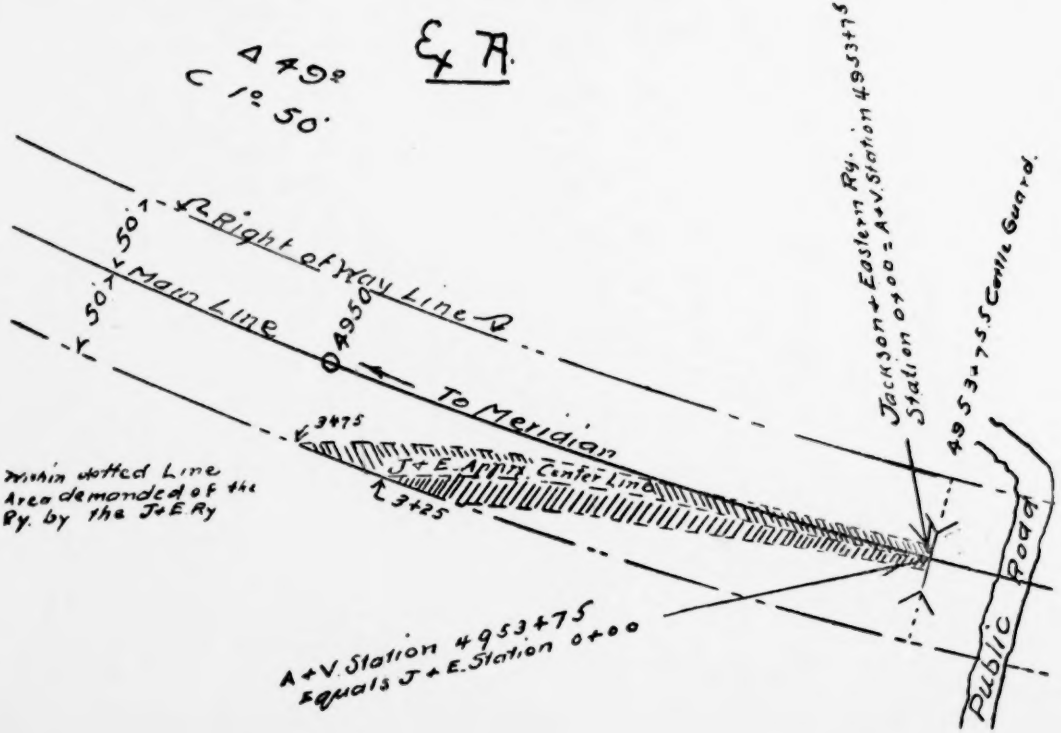
That the said condemnation petition concludes with a prayer reading as follows (R. of Miss. S. C. 29, 386):

> "Wherefore, your applicant prays that such steps be taken for the condemnation of said lands, rights, privileges and easements, for the purposes aforesaid, as are required by Chapter 43, and Section 4096 of the Annotated Code of 1906 of Mississippi.
>
> And as in duty bound your applicant will ever pray."

THAT THE LAND THUS SOUGHT TO BE CONDEMNED CONSTITUTES A SECTION OF PETITIONER'S MAIN LINE TRACK, and that if the Jackson & Eastern Railway Company acquires the right to **own, occupy and use** the said strip of land, the continuity of petitioner's railroad will be destroyed and instead of one continuous line of road from Meridian, Mississippi, to Vicksburg, Mississippi, it will own two disconnected pieces of track separated by land of the Jackson & Eastern Railway Company; that the land described in respondent's condemnation proceedings was by respondent's own engineers at the request of petitioner's counsel, cross hatched on a blue print of petitioner's main line as per Exhibit "A" attached, where it appears as a wedge-shaped area bisecting petitioner's "main line to Meridian, Mississippi", and actually embracing the embankment, ties and rails of petitioner's said main line.

Ex A.

Δ 49°
C 1° 50'


50'
Right of Way Line
50'
Main Line
4950
To Meridian
3475
J+E. Approx. Center Line
3425
Within dotted Line
Area demanded of the
Ry. by the J+E Ry
Jackson + Eastern Ry.
Station 0+00 = A+V. Station 4953+75
4953+75 Center Guard
Public Road
A+V. Station 4953+75
Equals J+E. Station 0+00

That moreover, the proposed location was entirely improper as a point of connection between the Alabama & Vicksburg Railway Company and the Jackson & Eastern Railway Company in that:

1. At the proposed point of connection the two railroads would approach each other on opposing curves.

a. Thereby impeding the views of the junction of the crews of the trains approaching it on each line, thus increasing the chances of accident.

b. Thereby making it necessary either not to elevate the outside rails of the tracks, a safety measure usually adopted on railroad curves, or else to have said tracks approach each other in opposing planes, in either case increasing the danger of accident.

c. Thereby making it necessary to cut for a switch connection, the outer rail of a curve, thereby entailing danger of derailment by switch splitting since centrifugal force would press the car wheel flanges closely against the outside rail and tend to cause them to catch in and split the switch inserted therein.

2. At the proposed point of connection, the two railroads would each be on a 10-foot embankment, thus materially increasing the danger, difficulty and expense of installing, maintaining and operating the proposed connection.

3. The proposed point of connection would be immediately adjacent to and would materially increase the hazard at an already dangerous and much used highway crossing at grade over the Alabama & Vicksburg Railway Company's tracks.

4. The proposed point of connection would be in the flood area of the valley of Pearl River and the building by the Jackson & Eastern Railway Company of an

embankment and line at that point would necessarily concentrate the flood waters of Pearl River on already exposed points of the Alabama & Vicksburg Railway Company's tracks, thus increasing the height of the flood against already exposed portions of the Alabama & Vicksburg Railway Company's embankment and increasing the danger of washouts of that embankment by Pearl River.

5, The point of connection would be between two trestles in the track of the Alabama & Vicksburg Railway Company, each about 400 feet in length and so close together that an Alabama & Vicksburg Railway Company train stopping with its locomotive at the proposed connection, would necessarily extend over one or the other of these trestles, thus endangering and obstructing its operatives in the handling of the trains and any passengers entering or alighting therefrom.

That the force and validity of these objections was testified to by disinterested witnesses of national prominence in railroad matters including Mr. E. M. Durham, formerly chief of the Engineering Department of the U. S. Railroad Administration, and Mr. A. A. Woods, Chief Engineer of lines west of the Southern Railway Company, and that the said E. M. Durham presented an actual survey showing that the Jackson & Eastern Railway Company could come to a junction with the Alabama & Vicksburg Railway Company at a point distant less than three miles from the proposed junction, which point would be free of all of the objectionable features present at the point of junction proposed by the Jackson & Eastern Railway Company. This survey showed and Durham testified that the route of the Jack-

son & Eastern Railway Company to the safer junction would be actually cheaper for the Jackson & Eastern Railway Company to build and cheaper for it to maintain.

That under the law of the State of Mississippi, as construed by the Supreme Court of that State, both previously (see *Vinegar Bend case*, 43 Sou. 292) and in this very case (see 95 Southern 733) the defendant in such a condemnation suit as was instituted by respondent before the Circuit Clerk, is prohibited from raising any question or making any defense save the question of the amount to be paid to it for compensation for the property taken or damaged. The defendant could not in that condemnation proceeding object to the fact that the Jackson & Eastern Railway Company was seeking to condemn its main line track and destroy the continuity of its railroad, nor could it deny its right to do so. It could not object that the proposed junction was an improper one. It could raise only one question, that is the question as to the amount to be paid it when the plaintiff in condemnation took its judgment and went into possession of the property sought to be condemned.

The language used by the Supreme Court of the State of Mississippi in the case at bar in laying down this doctrine, is as follows (95 Sou. 733):

> "Under the facts alleged in the bill as above set out we think the complainant has a right to resort to a court of equity to have this question determined, as it could not raise the question in the Eminent Domain proceedings as has been decided by this Court in the case of *Vinegar Bend Lumber Co. vs. Oak Grove & G. R. Co.*, 89 Miss. 84, 43 Sou. 292. In other words, in this case, the Court construed the statute of eminent domain and adjudicated that **the only question that could be decided in that proceeding was the amount of**

> **damages.** That the Court could not decide the right of the plaintiff in such proceedings to institute the proceedings, **nor could any other question be raised than that of the amount of damages,** and that the Circuit Court on Appeal from the judgment of the Eminent Domain Court had no greater right of jurisdiction than the Eminent Domain Court had. It is also decided that equity had jurisdiction and that it was the **court of exclusive jurisdiction in all other cases than the assessment of damages."**
>
> (Black letters by present writer.)

That because it was thus deprived of an opportunity to defend itself in the condemnation court, your petitioner went into the Chancery Court of Lauderdale County, Miss., and sued out an injunction restraining the further prosecution by the Jackson & Eastern Railway Company of the condemnation proceedings. This bill was dismissed by the Chancellor on demurrer and *supersedeas* was denied to complainant, but on application to the Supreme Court of Mississippi, that tribunal first allowed a *supersedeas* and later reinstated the Bill and remanded the case. See 91 Sou. 902, 95 Sou. 733.

The case was then tried on its merits in the lower court, whereupon the Chancellor handed down a decree reading in part (R. p. 68):

> "It is the opinion of the Court that the eminent domain proceedings instituted by the defendant against the complainant seek to condemn greater right in the property of the A. & V. Railway Company than a mere easement for the purpose of making its junction and it is the opinion of the Court that the J. & E. Railway Company, defendant herein, is not entitled to acquire a dominant right of ownership in the property of complainant under the law and **the application should be amended to that extent."**

Notwithstanding this finding, he dismissed the bill, thereby allowing the plaintiff in condemnation to secure a judgment for an interest in your petitioner's property greater than the Chancellor considered that the law permitted.

The case then went to the Supreme Court of Mississippi for a third time and was argued before a section consisting of three Judges of that Court. They being unable to agree, referred the case to the Court *en banc*. That Court then handed down a decision by a divided court, affirming the decision of the Chancellor, 101 Sou. 553. This decision of the Supreme Court of Mississippi together with its previous decision, 95 Sou. 733, which it held to constitute in part the law of the case, are here sought to be reviewed by the Alabama & Vicksburg Railway Company.

The last decision of the Supreme Court of the State of Mississippi (which is the highest court of that State in which the case could be tried) became final by the Court's action in overruling petitioner's suggestion of error on December 15, 1924, and petitioner immediately thereafter applied for and obtained from the Chief Justice of the State of Mississippi a writ of error with *supersedeas* to the Supreme Court of the United States. Said writ of error together with petitioner's assignments of error and the entire record and proceedings in this case have been certified to, filed and docketed in this Honorable Court, entitled Alabama & Vicksburg Railway. Company, et al., Plaintiff in Error, versus Jackson & Eastern Railway Company, Defendant in Error, No. 389, October Term 1924, which record, with the consent of this Honorable Court, is presented as a part of this application.

Nevertheless it has been suggested to petitioners that the proper procedure whereby to have said case reviewed by this Court, is by writ of *certiorari*, and petitioners desiring to certainly secure a review of this case, and the time being limited by law within which a writ of *certiorari* may be applied for, and not waiving any of their rights by virtue of the said writ of error, but still insisting upon the right to prosecute the same, and being advised that said judgment of the Supreme Court of Mississippi became and is final as of date December 15, 1924, so that this Court could require the case to be certified to it for its review and determination, under the Act of Congress permitting any case wherein a judgment has been rendered by the highest court of a State in which a decision could be had, to be certified for review and determination, file this their petition for a writ of *certiorari*, concurrently with said writ of error and show the following grounds therefor, to-wit:

I.

Petitioners, in their petition for injunction, set up:

a. That both it and the defendant were engaged in interstate commerce.

b. That the Federal Interstate Commerce Act, Sec. 3, Paragraphs 3 and 4, as amended by the Transportation Act of 1920, vested in the Interstate Commerce Commission the exclusive right to compel connections and the use of terminal facilities and other property by and between railroads engaged in interstate commerce; and that this exclusive power in the Interstate Commerce Commission necessarily precluded any State or any tribunal or agency thereof from exercising such power.

c. That to allow defendant to proceed with its condemnation proceedings in the State tribunal was an interference with and denial to petitioner

of its right, privilege or immunity under said Federal Statutes.

(b) No tribunal, State or Federal, can transfer an essential section of the main line track of one interstate carrier to another interstate carrier for a like purpose without violation of the Contract Clause and of the Fourteenth Amendment of the Constitution of the United States.

Said rights, privileges or immunities claimed by petitioner under said Federal Constitution and Statutes were denied to it by the State Court. The error of that denial is aggravated and the fact that the Interstate Commerce Commission's exclusive jurisdiction should have been recognized is accentuated by the fact that the case presented is a case in which:

a. Two interstate carriers have disagreed as to the location of a junction point whereat there is to be afforded reasonable, proper and equal facilities for the interchange of traffic between their respective lines.

b. Two interstate carriers have disagreed as to the rights in or to the first carrier's property, which the second carrier can acquire at such junction, two questions which the Interstate Commerce Commission under the Interstate Commerce Act as amended, particularly Section 3, paragraphs 3 and 4, is specially vested with authority to determine.

c. The carrier seeking the condemnation frankly admits through its President that its reason for seeking to condemn the property in question, was that it hoped thereby to secure the right to use petitioner's costly bridge and main line track into Jackson, Mississippi, a right which could be given it, if at all, only by the Interstate Commerce Commission under Sections 3, paragraphs 3 and 4, of the Interstate Commerce Act as amended by the Transportation Act of 1920.

Respondent's President testified in part as follows (S. C. Record, page 1003):

> "Q. And if I understand you, your desire to go to Curan's Crossing for a junction is predicated on the thought that if you get there you will be able to get a switch movement over the A. & V.?
> "A. I know it.
> "Q. From whom will you get this switch movement?
> "A. From the authorities that control both the A. & V. and the J. & E., the Interstate Commerce Commission."

d. The Respondent's President, before instituting the enjoined condemnation proceedings and after being told by petitioners that it had no objection to a junction at a proper place, but considered the point proposed impossible as a point of junction, wrote to the petitioner's President a letter in which he says:

> "In view of your position, there is nothing further for us to do, **EXCEPT TO SUBMIT THE MATTER TO THE INTERSTATE COMMERCE COMMISSION FOR THEIR CONSIDERATION,** and, of course, we both will have to be guided by their conclusions."

II.

The basis of the second ground upon which petitioners seek relief is thus stated by Mr. Justice Anderson of the Supreme Court of Mississippi in his dissenting opinion in this case, 101 Sou. 556:

> "The bill of the Alabama & Vicksburg Railway Company ought to have been sustained, in my judgment on another ground, and that is that the eminent domain application of the Jackson & Eastern Railway Company **failed to sufficiently describe the right or easement it sought to condemn.** It is unquestioned that the Jackson & Eastern Railway Company has no right under the statute to condemn the fee in the tracks and right-of-way

> of the Alabama & Vicksburg Railway Company for the junction. Where a lesser interest than the fee in land is sought to be appropriated in a condemnation proceeding, the lesser interest must be defined with such certainty as to apprise the owner of the nature and extent of the interest which is to be taken, and also with such certainty as to enable the jury to intelligently and according to law assess the compensation to be paid for the interest taken. *Pontiac Improvement Company vs. Board of Commissioners*, 104 Ohio State 447, 135 N. E. 635, 23 A. L. R. 866. Certainly the proceedings ought to be definite enough as to description of the right sought to be taken as that the owner of the fee will know how much he will have left after the proposed easement is taken. This is also necessary to enable the taxing authorities to properly assess the property. Unless what is taken by the condemnation proceedings is made definite how could the taxing authorities determine what assessment value to put on what was taken and what was left?"

Petitioners aver that (1) in view of the language quoted *supra* p. 12 from the Supreme Court of Mississippi wherein that tribunal expressly stated that petitioners can raise in the condemnation suit no question save the question of the amount of money to be paid to it, (2) in view of the language quoted *supra* p. 13 from the Chancellor who heard the case and who held that Respondent sought to condemn more than an easement; and (3) in view of the language quoted *supra* p. 17 from the dissenting opinion of Justice Anderson, who held that the condemnation petition does not sufficiently describe the property sought to be acquired, (4) in view of the language of the condemnation proceeding quoted *supra* p. 8, it is apparent that unless the Supreme Court of Mississippi is reversed and the condemnation proceed-

ing is enjoined, petitioners will be deprived of their property without due process of law and denied the equal protection of the laws in contravention of the Constitution of the United States, particularly the Fourteenth Amendment. This is so, for the reason, that unless the Supreme Court of Mississippi is reversed and petitioners' injunction is maintained, petitioners will be compelled to go before a jury of farmers with their hands tied so as to prevent their making any defense save on the question of amount of compensation and will have taken from them valuable property. **Just what property will be taken is the subject of a difference of opinion among the Mississippi Judges themselves.** This being so, **certainly the jury will not and cannot know just what property is being taken;** and petitioners, unless this fact is ascertained and made certain in advance, cannot make proper proof of their damages and cannot receive due process of law and the equal protection of the laws.

Petitioners point out that Sections 1867 and 1868 of the Mississippi Code of 1906, being the law under which Respondent is supposedly proceeding in the condemnation proceedings, read as follows:

> "1867 (1692) JUDGMENT. Upon the return of the verdict, the Court shall enter a judgment as follows, viz.:
>
> "'In this case the claim of (naming him or them) to have condemned certain lands named in the application, to-wit: (here describe the property), being the property of (here name the owner) was submitted to a jury composed of (here insert their names) on the_____day of_____, A. D._____, and the jury returned a verdict fixing said defendant's due compensation and damages at_____dollars, and the verdict was received and entered. Now, upon payment of the

> **said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.** Let the applicant pay the costs for which execution may issue. "J. P."'
>
> "1868 (1693) RIGHTS OF APPLICANT AFTER THE JUDGMENT. Upon the return of the verdict and entry of the judgment, if the applicant pay the defendant whose compensation is fixed by it, or tender to him the amount so found and pay the costs, he or it shall have the right to enter in and upon and take possession of the property of such defendant so condemned, and to appropriate the same to the public use defined in the application; and in case the defendant and his attorney absent themselves from the court, the payment may be made to the Clerk of the Circuit Court for him, and such officer shall be responsible on his bond therefor and shall be compelled to receive it."

That as petitioner will be precluded from raising any issue in these proceedings save the question of the amount of the award, there will necessarily be inserted in the form of judgment prescribed by Article 1867 of the Mississippi Code, the description of the property sought to be condemned, as described *supra* this petition, page 7 and under Articles 1867 and 1868, the Respondent, upon payment of the amount of the award, will be privileged "to enter upon and take possession of said property and appropriate it to public use, as prayed for in the application", as set forth *supra*, in the quotation from the application, this petition page 9.

The Jackson & Eastern Railway Company has alleged:

> "And your applicant further shows that it is necessary for it to **OWN, OCCUPY AND USE THE SAID STRIP OF LAND**, rights, privileges

> and easements above described in order properly to conduct its business as a common carrier, for which purpose it was organized."

That the said Jackson & Eastern Railway Company will, therefore, unless restrained, pay the amount of the award and will then proceed "to own, occupy and use the said strip of land", which strip of land consists of a section of **the main line of track, embankment and rails of your petitioners.**

That there is no provision in the Mississippi Statutes for a joint use by the applicant and the owner whose land is condemned. The applicant is entitled by the very terms of the statute and of the judgment to enter upon and take possession of the property condemned, meaning the exclusive possession.

Petitioners aver that as a result of the action of the Supreme Court of Mississippi in dissolving its aforesaid injunction and permitting this to be done, it is being deprived of its property without due process of law and denied the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States, which is expressly pleaded and relied on by it in its original petition for injunction, and that the State of Mississippi is interfering with and burdening interstate commerce in violation of the Commerce Clause of the Constitution.

III.

Petitioners further aver that under Article 18, Sec. 1, of the Interstate Commerce Act, as amended, it is provided that:

> "No carrier by railroad, subject to this act, shall undertake the extension of its line of rail-

> road, or the construction of a new line of railroad, shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over and by means of such additional or extended line of railroad unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction and operation of such additional or extended line of railroad."

Petitioner avers that the Jackson & Eastern Railway Company, defendant herein, sought from the Interstate Commerce Commission such a certificate of public necessity and obtained a certificate of public necessity authorizing it to build a line of road from Sebastopol, Mississippi, to Jackson, Mississippi.

That said certificate of public necessity was apparently granted with reluctance, since in its opinion rendered July 12, 1921, in Finance Docket No. 9, the Commission said:

> "**The record as a whole fails to afford reasonable assurance that the project will become a permanently successful enterprise.** However, since local interests are ready and willing to assume the burden with full knowledge of what the future may hold for the enterprise, it seems proper that they should be permitted to do so. But in view of the uncertain future of the road, we do not think it would be proper for us to sanction, at this time, the issuance of bonds to finance its construction."

That the said Interstate Commerce Commission did not approve or issue a certificate of public convenience covering a railroad from Sebastopol to Curan's Crossing and refused to consider, at this time, an application of

the Jackson & Eastern Railway Company to utilize petitioners' railroad bridge and main track into Jackson, Mississippi, but that nothwithstanding these facts the Jackson & Eastern Railway Company is now proposing to build a railroad from Sebastopol, Mississippi, to Curan's Crossing, in the hope that it may hereafter secure some authority to utilize the main line and bridge of the Alabama & Vicksburg Railway Company.

Petitioners aver that they are entitled under said Act to have the Jackson & Eastern Railway Company build to Jackson, Mississippi, and not to Curan's Crossing or certainly to be heard before said Commission before said line is built to Curan's Crossing. That this right, privilege and immunity has been denied them by the decisions of the Supreme Court of Mississippi.

Petitioners therefore aver that the said judgments of the Supreme Court of Mississippi deny to petitioners their rights and privileges under the Federal Interstate Commerce Act as amended by the Transportation Act of 1920 and under the Constitution of the United States, particularly the Fourteenth Amendment; all of which appears, it is respectfully submitted, in the record of the proceedings of the Supreme Court of Mississippi in said case, which record is herewith submitted.

Wherefore, your petitioners respectfully pray that a writ of *certiorari* be issued under the seal of this Honorable Court, directed to the Supreme Court of Mississippi, sitting at Jackson, in said State, commanding the Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and the proceedings of this Court in said case to the end that this case may be reviewed and determined by

this Honorable Court as provided by Section 237 of the Judicial Code as amended and other laws on the subject, and that the said judgment of the Supreme Court of Mississippi may be reversed by this Honorable Court and for such further relief as may seem proper. And your petitioners will ever pray.

ALABAMA & VICKSBURG RAILWAY COMPANY,
CANAL-COMMERCIAL TRUST & SAVINGS BANK,
FELIX E. GUNTER,
UNITED STATES FIDELITY & GUARANTY COMPANY,
By R. H. THOMPSON,
A. S. BOZEMAN,
S. L. McLAURIN,
MONTE M. LEMANN,
J. BLANC MONROE,
Attorneys.

February, 1925.

STATE OF LOUISANA,
PARISH OF ORLEANS,
CITY OF NEW ORLEANS.

Before me, the undersigned authority, personally came and appeared:

J. BLANC MONROE,

who, being duly sworn, did depose and say that he is of Counsel for the Petitioners, Alabama & Vicksburg Railway Company, Canal-Commercial Trust & Savings Bank, Felix E. Gunter and United States Fidelity & Guaranty

Company; that he knows of the above proceedings had and that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

J. BLANC MONROE.

Sworn to and subscribed before me, this 20th day of February, 1925.

WATTS K. LEVERICH, N. P.

No. 244

IN THE

United States Supreme Court

OCTOBER TERM 1924 1925

THE ALABAMA & VICKSBURG RAILWAY COMPANY, ET ALS.,
Petitioners,

versus

JACKSON & EASTERN RAILWAY COMPANY.

BRIEF OF THE ALABAMA & VICKSBURG RAILWAY COMPANY, ET ALS., IN SUPPORT OF APPLICATION FOR CERTIORARI.

R. H. THOMPSON,
A. S. BOZEMAN,
S. L. McLAURIN,
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Counsel for Petitioners.

March, 1925.

Hauser Ptg. Co., "The Legal Printers," 720 Poydras St., New Orleans.

SUBJECT INDEX.

TABLE OF CASES.

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BRIEF OF THE ALABAMA & VICKSBURG RAILWAY COMPANY, ET ALS., IN SUPPORT OF APPLICATION FOR CERTIORARI.

IF THE COURT PLEASE:

The dry and legally necessary facts of this case are stated in the petition for *certiorari;* the human interest facts, such as:

(1) The fact that every single engineer and every single conductor on The Alabama & Vicksburg Railway Company, men who would necessarily have to risk their lives in going over the proposed junction, have made in this record their earnest and vigorous protest against the proposed junction point which the Chairmen of their

respective organizations have denounced as a **death trap,** while **not a single operative** who would be connected with the running of a train over the proposed junction was put on the stand to defend that location by the Jackson & Eastern Railway Company;

(2) The fact that the Jackson & Eastern employee who located the junction point had so little standing as an engineer that within a few months of the time of making that selection, **he was seeking a position as a rodman,** a beginner's position, in the Engineering Department of The Alabama & Vicksburg Railway Company;

(3) The fact that some of the most eminent engineers of the United States, men entirely unconnected with the Alabama & Vicksburg Railway Company and entirely uninterested in this controversy, have sworn that "it would be difficult to find a worse location for this junction between Pearson and Pearl River". (See Durham, p. 775; Wood, p. 337);

(4) The fact that the Jackson & Eastern Railway Company's President has virtually admitted that the proposed point of junction was selected not on its merits, but in furtherance of an ulterior motive of the Jackson & Eastern Railway Company;

have not been stressed, because the length limits so rigidly and properly prescribed for applications for *certiorari* have not permitted. Suffice it to say that certainly from your petitioner's point of view, the Jackson & Eastern Railway Company's attitude towards the community in which the line is proposed to be built is "Let me build this line in my own way at whatever

cost or expense or danger to The Alabama & Vicksburg Railway Company, its property and its operatives, or I will not build it at all", and the community has wanted the railroad built.

As a result of this combination of desires, petitioner faces the probability of having thrust upon it, a junction point which will endanger, burden and seriously interfere with its interstate commerce operations. It avers that unless respondent's action is enjoined, it will moreover be deprived of a section of its main line track and right-of-way and have the continuity of its railroad destroyed.

Naturally, the Alabama & Vicksburg Railway Company being an interstate carrier threatened with loss of its rights, turns to this court for protection under the Federal Constitution and States. It predicates its prayer for relief upon the writ of error and supersedeas which it has sued out and upon the assignments of error therein set up. It predicates its prayer for relief here out of a superabundance of caution upon three propositions which it states as follows:

I.

The Interstate Commerce Act as amended by the Transportation Act of 1920 vests in the Interstate Commerce Commission exclusive jurisdiction of track connections between interstate carriers.

(a) No State tribunal may order such connections or fix the relative rights of carriers thereunder;

(b) No tribunal, State or Federal, can transfer an essential section of the main line track of one interstate carrier to another interstate carrier for a like purpose

without violation of the Fourteenth Amendment and the Contract Clause of the Constitution of the United States.

II.

(a) When a State condemnation statute prevents a defendant in condemnation from raising in the condemnation suit any issue whatever save as to the amount of compensation to be paid, the condemnation defendant is denied due process of law and the equal protection of the law guaranteed by the Fourteenth Amendment, if the petition for condemnation fails clearly to declare the precise property and the precise interest therein sought to be condemned, since in the absence of such freedom from ambiguity, defendant cannot properly prepare and present itself from limited defense.

III.

Until a railroad has obtained a certificate of public necessity from the Interstate Commerce Commission, it cannot build a new line or connection with an established line; nor can it, after obtaining such a certificate, deviate from the route therein indicated in building the new lines; nor can it resort to State agencies to force a junction with another railroad at a point not on the route named in the certificate of public necessity without violating with other railroads' rights, privileges and immunities under the Interstate Commerce Act as amended by the Transportation Act of 1920.

These propositions will be discussed *seriatim*.

1-A.

The Interstate Commerce Act As Amended by Trans-

portation Act 1920 Vests in the Interstate Commerce Commission Exclusive Jurisdiction of Track Connections Between Interstate Carriers. No State Tribunal May Order Such Connections or Fix the Relatives Rights of the Carriers Thereunder.

In this connection, we point out the following cogent facts:

Both the Alabama & Vicksburg Railway Company and the Jackson & Eastern Railway Company are engaged in interstate commerce. In fact, that commerce constitutes the bulk of the business of each company. The evidence on the subject is in part as follows:

INTERFERENCE WITH INTERSTATE COMMERCE, MAIL AND EXPRESS.

MR. L. A. JONES
testified (p. 34):

Q. What proportion of the regularly scheduled trains of the A. & V. handle interstate commerce?
A. All of them.
Q. Do the trains of that road, crossing this point of intersection, handle United States mail?
A. Practically all the passenger trains handle mail. Four carry postoffice cars.
Q. What, if any, importance is the Alabama and Vicksburg Railway as an artery in the Railroad Service?
A. The A. & V. is a Class One railroad, and forms a line from Southeast Mississippi to Vicksburg on the West of the State and connects with a line to the southwestern part of the country, and so forms a very substantial artery from the southeast to the southwest.
Q. What effect would any such pretended point of junction with the Alabama and Vicksburg Railway have upon interstate commerce?

A. It would interfere with all our trains.

Q. You spoke of the Alabama and Vicksburg Railway being a Class One road, what do you mean?

A. Railroads, for conveniences, are classed by the Interstate Commerce Commission.

Q. Will you please state to the Court whether or not the track of the A. & V. Railway at the point where it is in the condemnation proceedings sought to be condemned essential to interstate commerce and the United States Mail?

A. Yes, sir, absolutely. It is one of the essential points in the main track.

Q. Can you give us in terms of dollars, the gross revenue of the A. & V.?

A. Approximately the gross revenue of the Alabama and Vicksburg for the years 1921, 1922 and 1923—

Q. What was it in 1920?

A. In 1920, it was about $10,000.00 a day; in 1921, something over $9,000.00; in 1922, due to the strike, under $9,000.00 a day; and this year, a little over $11,000.00 a day.

Q. Per day?

A. Yes, sir.

Q. In case your traffic was suspended for a day, what would be the effect on your revenue?

A. It would be very serious. Of course, if it was just for a day it would not be so great, but the result would be that shipments would be rerouted, or routed rather than would otherwise go by the A. & V. to go by New Orleans or Memphis, and quite a lot of passengers, when they knew that our traffic was interrupted, would go by other routes.

MR. J. C. STAMM

testified (p. 136):

Q. Has the A. & V. a single track or a double track?

A. It is a single track line.

Q. Has it any branches?

A. It has no branches.

Q. The fact of its being a single track and

having no branches, would that increase the seriousness of the damage resulting from the bank getting in bad in any locality?

A. Yes, sir. There is only one line there and there is no opportunity for assistance until they could repair any damage to the track.

Q. Are you familiar with the character of the traffic of the A. & V.?

A. Yes, sir.

Q. Can you tell us what proportion of its trains which operate over this proposed junction point is engaged in interstate commerce?

A. All the passenger trains are engaged in handling interstate commerce and all the freight trains.

Q. Are any of the trains engaged in carrying United States Mail?

A. We operate four passenger trains each way every day, and each of these passenger trains carry United States Mail. Three each way carry mail cars and the other two carry mail.

Mr. S. A. Neville (p. 202) admits that the J. & E. is engaged in interstate commerce and (on p. 889) he states that the success or failure of his road will depend on its divisions of the rates to Ohio River crossings, thus clearly indicating that he expects the bulk of the business to be interstate. He also admits that the bulk of his freight is lumber which will move East out of the State and that 80% of his freight will be in carload lots.

Second, the record shows conclusively that the real object of the Jackson and Eastern Railway Company is to obtain the use of the main line track and bridge of the Alabama and Vicksburg Railway Company.

If the Court will turn to the testimony of defendant's own engineer and star witness, Mr. Stacker, it will find him swearing (R. p. 598):

"Q. Mr. Stacker, Mr. Duffee testified tha they started out to run a line of railroad fron Sebastopol to Jackson. Why didn't you run you road to Jackson?

A. Well, we run the line very close to Jack son. We considered that we would be practicall at Jackson. We are going towards Jackson.

Q. Had you in mind in coming to this poin anything in regard to the bridge of Pearl River

A. The bridge of the A. & V.?

Q. Was that considered by anybody?

A. The consideration was that we would b enabled to make arrangements with the A. & V and cross the river by the A. & V. bridge.

Q. And did that consideration weigh wit you in locating the proposed junction point?

A. *We wanted a junction with the A. & V so we could use the A. & V. track and bridge, portion of the track West of the river until w could enter Commerce Street.*

Such a user could, of course, only be obtained, if a all, through the Interstate Commerce Commission.

Third, This is to be done according to the testimon of Mr. Neville in order to make the J. & E. Railway Com pany a link in a through system of interstate commerc carriers acceptable to the Interstate Commerce Com mission under the consolidation provisions of the Tran portation Act of 1920. His testimony on that subject as follows:

(R. p. 927):

Q. Now, going back to the proposition th you are testifying about, after the timber was r moved, the railroad would have to be abandone why would you have to abandon the road?

A. Simply because the road could not b utilized in the scheme of consolidation of the I terstate Commerce Commission and the Act Congress at this time. It is not in line with th

scheme of connection of railroads. If this junction was made at Pearson, I could not perfect any arrangements with any road running North or South, couldn't join."

(R. p. 985):

Q. You stated yesterday that in order to live a short line road such as you had contemplated building would have to form a connecting link between other lines. What other lines have you in mind as a connecting line between them?

A. The G. & S. I. and the N. O. G. N.

Q. The N. O. G. N. has terminal facilities at Jackson?

A. Yes, sir.

Q. And has a right-of-way in the streets of Jackson?

A. Yes, sir. The N. O. G. N. has a right-of-way behind the Old Capitol if it has not been sold.

Q. And that right-of-way would be in a direct line of the route A-B, if you went straight across the river?

A. I have no authority to use their right-of-way.

Q. I asked you if that right-of-way of the N. O. G. N. would not be on a direct route, A—B?

A. Then I would have to come down here nearly to Curan's Crossing.

Q. But isn't it on a direct line as shown here on this map?

A. Taking an air line, it is direct. Still you would have to come down here even with Curan's Crossing across the river.

Q. I am speaking of the N. O. G. N. behind the old Capitol.

A. If you wanted to go on an extremely northern air line it would be better, but I could get better service by coming down here.

Q. And that would be quickest?

A. Yes.

Q. The northern end of the N. O. G. N. right-of-way would be the quickest way?

A. Yes, sir.

Q. Materially so?

A. Some, yes.

Q. Now, if you did that you would be making a direct connection with your line in the yard of the N. O. G. N., which is your objective?

A. Yes, sir.

Q. Whereas, if you come down to Curan's Crossing you would have to connect with the N. O. G. N. by going over the A. & V. Is that correct?

A. That is correct.

Third, Neville also testified that another, to him, compelling reason why he wished to make the junction at this unduly dangerous Curan's Crossing was because he thought that if the junction was made there, the Interstate Commerce Commission would compel the A. & V. Ry. Co. to handle his freight for him into Jackson on a switch movement. His testimony on this subject is as follows:

(R. p. 1003):

Q. And if I understand you, your desire to go to Curan's Crossing for a junction is predicated on the thought that if you get there you will be able to get a switch movement over the A. & V.?

A. I know it.

Q. From whom will you get this switch movement?

A. From the authorities that control both the A. & V. and the J. & E., the Interstate Commerce Commission.

Q. If you are unable to get the Interstate Commerce Commission to grant you a switching movement out of Curan's Crossing the main defense, from your point of view, between Curan's Crossing as a junction and the junction point suggested by the A. & V. will be eliminated?

A. Absolutely, as a defense only.

Q. What do you mean?

A. I mean that any line, that under the present law policy governing *the consolidation and*

building of carriers, to make the line a permanent success it must go into Jackson to make connections with other lines.

Q. It must go into Jackson, how, on its own rails?

A. No, sir.

Q. How?

A. Either go in on its own rails or the joint rails of other carriers.

Q. What other carriers?

A. The A. & V.

Q. Then: it is your testimony that your line cannot be a permanent success unless it is granted the use of the facilities of the A. & V.?

A. Not that, it could go in on its own rails.

Q. I asked you if it was going in on its own rails?

A. I don't know.

Q. Didn't you twice say it couldn't go in on its own rails?

A. I didn't say so.

Q. If you go in on your own rails, where will you go?

A. I don't know. I have no authority to build in any other way.

Q. Have you made any plans to go in on your own rails?

A. No, sir.

Q. Have you made any plans to go in on the rails of the A. & V.?

A. I have tried to.

Q. What terminals do you propose to use if you went in on the A. & V. rails?

A. I first considered using the N. O. G. N. line or the A. & V. terminals.

Q. Why did you not propose to go across the river directly and build your own bridge and terminals?

A. In the first place, I have no authority from the Interstate Commerce Commission to do that, and in the second place it would be a financial impossibility for me to do it.

Q. You mean that the cost of the bridge and the cost of the terminals would be financially prohibitive?

A. Yes, sir, and the financial operations inside would be impossible.

Q. I understand you by being financially impossible, you mean that if you build a bridge and acquire terminals in Jackson that the interest charges on that investment would be so heavy that your road couldn't stand it?

A. Yes, sir. The J. & E. Railway is only 75 miles long and a road that length couldn't undertake a program that would be involved in such a proposition as outlined by you.

Q. Then you propose to use the costly bridge and the costly terminals of the A. & V.?

A. I am not proposing to do that now. I did originally, but not now.

Q. You will later on have your own bridge or else use the bridge and terminals of some other carrier?

A. Yes, sir.

Q. You say that to build your own bridge and terminals is a financial impossibility?

A. For the J. & E. under the present situation.

Q. Then you propose to use, if you go into Jackson, the bridge and terminals of the A. & V.?

A. I do not propose to do it now.

All of these 4 questions, namely (1) Jurisdiction of Interstate Carriers; (2) The use of the main line track and terminal facilities of the A. & V. Ry Co.; (3) The acceptableness *vel non* of the proposed J. & E. Ry. Co. to the Interstate Commerce Commission as a link in a system of consolidated connecting carriers; and (4) The forcing of the A. & V. by the Interstate Commerce Commission to handle through business into Jackson on a switching charge *are matters peculiarly and admittedly within the jurisdiction of the Interstate Commerce Commission,* and if the proper place for the location of this junction is to be determined because of its bearing upon

these four issues, it would appear not only a logical, but essential, that the Interstate Commerce Commission should have and retain jurisdiction to fix the point of junction. The J. & E. is asking that this junction be placed at a point considered by eminent engineers and by all the men who must pass over it to be improper and dangerous, because it says that it is the point which the Interstate Commerce Commission would consider most desirable in granting it the four items of advantage listed. Its statement to that effect is unsupported and is contradicted but is its sole reason for demanding this improper junction. We point out that if the propriety of the point of junction is to be determined by future action by the Interstate Commerce Commission, *then the junction point should be determined by that body.*

The matter apparently appealed to President Neville, himself, in that way, as appears from his letter to President Jones of October 26, 1921, in which he says in part:

> "In view of your position, there is nothing further for us to do **EXCEPT TO SUBMIT THE MATTER TO THE INTERSTATE COMMERCE COMMISSION FOR THEIR CONSIDERATION,** and, of course, we both will have to be guided by their conclusions."

and as appears from the fact that he actually filed a petition with the Interstate Commerce Commission, but on being informed that it was prematurely filed, because the two roads were not near enough to join, (the J. & E. not having then or yet built its line to the junction point) withdrew it. This withdrawal took place long after the injunction herein was sued out by the A. & V.

Ry. Co. When the injunction was sued out the application was actually pending before the Interstate Commerce Commission.

THE LAW.

That the Interstate Commerce Commission, and it only, has jurisdiction to order a junction between these carriers under these circumstances, affirmatively appears from the following statutory law and judicial decisions:

The Interstate Commerce Act, as amended by the Transportation Act 1920, *changed the prior law* by conferring the following additional authority upon the Interstate Commerce Commission. We quote from Section 3, Paragraphs 3 and 4, of the Act, as follows:

> "(3) All carriers engaged in the transportation of passengers or property subject to the provisions of this Act, shall according to their respective powers, *afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines* and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares and charges between such connecting lines or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.
>
> "(4) If the Commission finds it to be to the public interest and to be practicable without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, *including main line track or tracks for a reasonable distance outside of such terminal* of any carrier by another carrier or carriers on such terms and for such compensation as carriers affected may agree upon, or in the event of a failure to

agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

The Sections thus written into the Interstate Commerce Act by the Transportation Act of 1920 have recently been construed by the courts of last resort of the States of Ohio and New York, and in each instance, it has been held that since the adoption of the Transportation Act of 1920, the **Interstate Commerce Commission has exclusive jurisdiction of the subject matter of track connections** between carriers engaged in interstate and intrastate commerce. The decisions on the subject are as follows:

Supreme Court of Ohio, Dec. 4, 1923, *Lake Erie, A. & W. R. Co. vs. Public Utilities Commission*, 141 N. E. 847:

(Syllabus):

"Where a railroad engaged in interstate and intrastate commerce invokes the jurisdiction of the Interstate Commerce Commission for an order requiring another railroad likewise engaged in interstate and intrastate commerce to join in making a physical connection between the two lines, pursuant to Paragraph 3, Section 3, of the Interstate Commerce Act, as amended by the Transportation Act of February, 1920, (U. S. Comp. St. Supp. 1923, §8565[3]), and before final determination thereof such applicant road, without dismissing such proceeding before the Interstate Commerce Commission, makes application to the Public Utilities Commission of Ohio for exactly the same connection, and secures the same in so far as intrastate commerce is concerned, and thereafter the Interstate Commerce Commission, whose jurisdiction was first invoked, having fully heard

the original application, denies the same upon grounds affecting both interstate and intrastate commerce, held under such circumstances the jurisdiction of the Interstate Commerce Commission is exclusive and the Public Utilities Commission of Ohio was without jurisdiction to grant such order."

(P. 849):

"The Court of Appeals of New York has recognized the exclusive character of this jurisdiction in the case of *People of State of New York ex rel. New York Central Rd. Co. vs. Public Service Commission*, 233 N. Y. 113, 135 N. E. 195, 22 A. L. R. 1073, *in which it was held that the Public Service Commission of that State had no authority to make an order directing two railroad companies engaged in interstate and intrastate commerce, whose lines ran through the City of Batavia, to install a connecting line;* that both of the railroads in question being engaged in interstate and intrastate commerce, *the relief sought could be granted only by the Federal Interstate Commerce Commission*, in compliance with the Interstate Commerce Act, Section 3, Paragraph 3, as amended by the Transportation Act of 1920.

"It is contended that the contrary view has been held by the Supreme Court of Wisconsin in *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. vs. Railroad Commission of Wisconsin*, 178 Wis. 293, 189 N. W. 150.

"Referring to the decision of the Court of Appeals in this last named case, the Supreme Court of Wisconsin, at page 279 of 178 Wis., at page 152 of 189 N. W., uses this language:

> "'The Court of Appeals reversed the order of the Public Service Commission requiring a connection, on two grounds: First * * * and Second: *Because Congress by the passage of the Transportation Act of* 1920 * * * *so amended the second paragraph of Section* 3 *of the Interstate Commerce Act as to give the Interstate Commerce Commission jurisdiction of connecting tracks, and by so doing took*

> *away the right of a State Commission to act upon the subject.* The latter reason, even if conceded to be a valid one where it applies and upon that subject we express no opinion, does not affect this case because the proceedings were begun and the order made before the passage of the Federal Act.'
>
> "But conceding that the Wisconsin case denies the exclusive character of the jurisdiction conferred by Paragraph 3, Section 3, of the Interstate Commerce Act, yet it, and also the New York, California and South Carolina cases, are to be distinguished from the case at bar, for the reason that in none of them had the affirmative jurisdiction of the Interstate Commerce Commission been first invoked by the applicants."
>
> "We are confronted with the situation, where a jurisdiction voluntarily invoked having been exercised, its effect cannot be denied."
>
> * * * * *
>
> "It is self-evident that this connection once made is equally available for interstate as well as intrastate commerce. The same connection is asked for before the Interstate Commerce Commission, and though granted by the Ohio Public Utilities Commission, in so far as intrastate traffic is concerned, its use for interstate commerce is at once available so far as the physical connection is concerned."

Court of Appeals of New York, March 7, 1922, *People ex rel. New York C. R. R. Co. vs. Public Service Commission,* 233 N. Y. 113, 135 N. E. 195, 22 A. L. R. 1073:

(Syllabus 1):

> "State authorities *cannot compel interstate carriers to make physical connections between their tracks for interchange of traffic,* notwithstanding the Federal Transportation Act provides that the authority of the Interstate Commerce Commission shall not extend to the construction

of spur, industrial, team, switching, or side tracks located wholly within a State."

(P. 1076):

"We are also of opinion that the relator and the Lehigh Valley Company being engaged in interstate and intrastate commerce, the relief sought in this proceeding **CAN BE GRANTED ONLY BY THE INTERSTATE COMMERCE COMMISSION.**

"The Transportation Act of 1920 (41 Stat. at L. 479, Chap. 91, Fed. Stat. Anno. Supp. 1920, p. 120), §405, amended the second paragraph of §3 of the Interstate Commerce Act to provide: 'All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.'

"A violation of that provision of the Act of Congress authorizes a complaint by any interstate party to the Interstate Commerce Commission, and, after a hearing before that Commission, to such relief as the facts warrant. The Interstate Commerce Commission is clothed with authority by the section quoted to compel carriers to afford reasonable and proper facilities for the interchange of traffic between their respective lines. The order made by the Public Service Commission commands relator and the Lehigh Valley to make such track connections between their roads as shall be necessary or proper to establish and furnish adequate and convenient interchange of freight between said roads. To sustain the order of the Public Service Commission in the instant case would necessarily establish that the two several commissions mentioned were clothed with

jurisdiction to grant the relief sought, and require us to ignore the well established principle of law that, the Congress having delegated to the Interstate Commerce Commission power to deal with the subject matter of this proceeding, and exercise of like power by the State is thereby superseded. *Erie R. Co. vs. New York,* 233 U. S. 671, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, 34 Supt. St. Rep. 756, Ann. Cas. 1915D, 138; *Chicago R. I. & P. Co. vs. Harwick Farmers' Elevator Co.,* 226 U. S. 426, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203, 33 Sup. Ct. Rep. 174.

"Counsel for the Public Service Commission calls attention to subdivision 22 of §1 of the Interstate Commerce Act as amended by §402, Transportation Act 1920, which reads as follows: 'The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.'

"Paragraphs (18) to (21) referred to, prohibit a carrier from extending its line of road or the construction of a new line or road, or the operation of any extension, save when permitted so to do in the manner provided for in the paragraphs enumerated. Counsel for the Commission argued that, the line or piece of road ordered to be constructed being wholly within the State, the Public Service Commission was empowered to make the order under review. We do not coincide with the argument of counsel. The track ordered to be constructed was not a spur, industrial, team, switching or side track, but rather, as stated in the order of the Commission, was a track connection between the two roads of relator and the Lehigh Valley, and said two roads were also commanded to lay and install such other tracks as may be necessary to furnish adequate and convenient interchange of freight between said railroads.

> "The order of the Appellate Division should be reversed, and the determination of the Public Service Commission annulled, with costs in this Court and the Appellate Division.
>
> "Hissock, Ch. J., and Cardosa, McLaughlan, and Andrews, J. J., concur.
>
> "Crane, J., concurs on first ground stated in opinion.
>
> "Pound, J., not voting."

We respectfully submit that this reasoning is sound and that under the paragraphs quoted from the Transportation Act of 1920, Congress has taken possession of the field of track connections and has vested the exclusive power to regulate and control such connections in the Interstate Commerce Commission. This being so, the power of the State either through a railroad commission or through a condemnation court, or otherwise, to give or regulate track connections is at an end.

There can be no division of the field: The power of Congress is paramount and exclusive.

233 U. S. 671, *Erie R. R. Co. vs. N. Y.* (58 L. Ed. 1149):

> "After Congress acts on a matter within its exclusive jurisdiction there is no division of the field of regulation."

There is no need to multiply authorities on that point.

If we are right in this, then plainly the Mississippi Railroad Commission would be without authority to make such a connection and *a fortiori*, the Mississippi *condemnation court*, a tribunal presided over by a Justice of Peace, in which nothing may be contested save the amount of damages to be awarded would be without

power to make such a junction. If the Interstate Commerce Commission has the exclusive jurisdiction of subject matter, then plainly the State of Mississippi and the various subdivisions and instrumentalities of that State are without that power, since they have no power, save such as is vested in them by the State, and if the State is devoid of power, certainly they are without it. Power, like water, can rise no higher than its source. If this position be correct, the fallacy of the contention of the Jackson & Eastern Railway Company is revealed. That company boldly asserts and arrogates **TO ITSELF THE EXCLUSIVE RIGHT** to determine where this junction shall be. It asserts the right to locate the junction **WHERE IT AND IT ONLY DESIRES IT** and where the Alabama & Vicksburg Railway Company and the State Highway Authorities, represented by the Highway Commissioner, who took the stand and swore that the proposed junction would constitute a serious flood menace to the State Highway, do not desire it and have compelling reason for not wanting it, and it proposes to carry out its own arbitrary wishes in the matter by invoking the aid of the State's condemnation court.

If this be lawful, then what becomes of the Commerce Clause of the Constitution, the Interstate Commerce Act and Transportation Act of 1920? It needs no lively imagination and no gift of prophecy to discover that if a State J. P. Court can saddle upon an interstate railroad such junction points as it desires, that State J. P. Court cannot only regulate, but can destroy the interstate railroad. There can be no half measures, no midway point, no twilight zone, no concurring jurisdiction. As the New York Court points out, either the

State tribunal or the Federal tribunal must have exclusive jurisdiction, else we would be faced at once with the situation where the Federal tribunal would prohibit the junction, while the State tribunal would order it installed, or vice versa. This being so, it cannot be doubted that the proper authority to have exclusive jurisdiction and to give consideration to the rights of the various parties and the public and to actually order the juncton is **NOT A STATE INSTRUMENTALITY** at all, but the Interstate Commerce Commission, which in turn is obligated, when it passes upon the question, to protect and reserve to the Alabama & Vicksburg Railway Company the rights guaranteed to it by the Constitution of the United States.

1-B

To Permit a Small Unimportant Railroad to Condemn the Right to "Own, Occupy and Use" for its Purposes a Section of the Main Line Track of one of the Important Railroad Arteries of the State, which Section of Track has been Owned and Used as the Main Line for Many Years by the Larger Railroad Under Its Charter from the State and which Section of Main Line Track is Essential to the Maintenance of the Continuity of Its Trunk Line, Is to Deprive the Larger Railroad of Its Property Without Due Process of Law to Deny It the Equal Protection of the Law to Devest Its Vested Rights and to Impair the Obligation of Its Contract with the State, the Whole in Violation of the 14th Amendment and the Commerce and Contract Clauses of the Federal Constitution.

It appears from the condemnation petition, which is quoted in the petition for certiorari (p. 9), that the J. & E. Ry. Co. is seeking "to own, occupy and use" the main line track of the A. & V. Ry. Co. It appears from the record that the A. & V. Ry. Co. is a railroad corporation chartered under the laws of the State of Mississippi, which has owned, occupied and used this section of its main line track for many, many years. It appears that the line of the A. & V. Ry. Co. is a practically straight, single line of track without branches extending from Meridian, Mississippi, to Vicksburg, Mississippi, and it appears that the section of track sought to be condemned by the J. & E. Ry. Co. is about midway between Meridian and Vicksburg, and that if this section is condemned, the continuity of the line of the A. & V. Ry. Co. will be broken and its railroad divided into two disconnected pieces of track. We have seen by the admission of President Neville of the Jackson & Eastern, himself (p. 957), that the traffic of the two railroads may not even be compared, the A. & V. Ry. Co. being a trunk line and one of the important through interstate rail and mail routes of the southwest, while the Jackson and Eastern is a not yet complete experimental route and is *an enterprise of so doubtful a nature that the Interstate Commerce Commission has been unwilling to permit it to sell its bonds to the public,* the Interstate Commerce Commission's finding on this subject being as follows:

(P. 858):

> "The record as a whole fails to secure reasonable assurance that the project will become a permanently successful enterprise. However, since local interests are ready and willing to assume the burden with full knowledge of what the future

> may hold for the enterprise, it seems proper that they should be permitted to do so, *but in view of the uncertain future of the road, we do not think it would be proper for us to sanction at this time the issuance of bonds to finance its construction.*"

We have quoted President Neville's own statement on oath in this case that the purpose of the J. & E. in seeking to condemn the A. & V. main line was to save itself expense.

That under these circumstances, the J. & E. Railway Company could not acquire through any state instrumentality the right to *own, occupy and use* a section of the main line of the A. & V. Ry. Co., without infringement of the rights, privileges and immunities guaranteed to the A. & V. Ry. Co. by the Constitution of the United States, particularly the contact clause and the XIV amendment, is conclusively demonstrated by the following authorities and by the reasoning upon which these authorities rest.

20 C. J. page 606, §92:

> "A limitation on the power of a railroad company to appropriate the property of another railroad is that it cannot take the property of another company to apply it to the same use. If the taking would result merely in a change of ownership without affecting the use of the property, it becomes a matter of mere private concern without at all affecting the public interest. Nor can one railroad company take a fragment of a competing road constituting the most valuable part of it where this will destroy the usefulness and value of the remaining fragment."

Elliott on Railroads, 3rd Edition, §1130:

> "So, it is said that, 'while a public service corporation like a railroad company is bound to ren-

der to the public certain services appropriate to its particular functions, it is not bound to permit its property to be subjected to use by a rival corporation, unless by express statutory enactment and by due process of law thereunder. And, where the appropriation of the franchise of a street railroad company by a railroad company *was made merely as a matter of economy, and to avoid the purchase of valuable property which the railroad company must have acquired to reach its terminus without interference with the street railroad, it was held that no such necessity existed.*

Elliott on Railroads, 3rd Edition, §1225:

"Taking right of way of another road: When not allowed. Where the statute confers only a general authority to condemn property for railroad purposes land appropriated by a railroad company for public use can not afterwards be appropriated by another company for a similar use where the two cannot coexist, *except in case of a necessity so absolute that without such appropriation the grant to the latter company will be defeated*, a necessity arising from the very nature of things, over which the company has no control, *not one created by the company itself for the sake of convenience or economy.* As a general rule, under such authority, a corporation will not be permitted to condemn property already devoted to the public use for any purpose wholly inconsistent with such use. This rule seems particularly applicable where one company is seeking to condemn and take the right of way of another company longitudinally. **THUS, IT HAS BEEN HELD THAT ONE RAILROAD COMPANY CANNOT APPROPRIATE A PORTION OF THE RIGHT OF WAY OF ANOTHER RAILROAD COMPANY FOR THE PURPOSE OF BUILDING A PARALLEL ROAD.** Nor will one railroad company be permitted for any purpose to take such a part of the line of another road as to practically destroy such road. And courts should give due consideration to the question of the future needs of a railroad in fulfilling its chartered purpose and

performing its public duty as a common carrier before they undertake to deprive a railroad company of any part of its right of way at the instance of another corporation. Where a petition by a railroad company for the appointment of commissioners to condemn the 'located route' of an existing railroad shows that it seeks to condemn a part of the route generally, and not merely for the purpose of crossing, an order made thereon will be set aside. And where a railroad corporation is seeking to condemn a longitudinal section of the right of way of another company for its exclusive use, it may be restrained by injunction unless express authority to make such condemnation has been conferred."

163 Fed. 724, *Elkins Ry. Co. vs. Western Md. R. Co.* (p. 732):

"It must be conceded that, where one railroad company has secured under its charter rights the right of way and built thereon its line of road and is using the same for public uses, *the Legislature could not authorize the taking wholly thereof by another railroad corporation for like public use.* The extent of its power would be to authorize the second company to place upon the land an additional burden or easement on or over it to be constructed so as 'not to impede transportation of persons or property along the same' by the first corporation owning the fee title to the land. These fundamental principles were well set forth and settled by Tucker, J., in the *Tuckahoe Canal Company vs. Tuckahoe & James River Railroad Co.*, 11 Leigh (Va.) 42, 36 Am. Dec. 374. Where railroads cross each other for the mutual benefit of both, and do 'not impede the transportation of persons and property along the' route of the first one owning and operating the right of way, the Legislature may well direct as it has in clause 7, §2343 (Chapter 54, §50), that the railroad intersected 'shall unite with the corporation owning such new railroad in forming such intersection', but this section cannot be construed as, first, authorizing the new company *to take wholly the property of the old*

to the destruction of its right to use and operate its road; nor, second, to take such right of easement and joint use without paying just compensation. Such a construction of this statute would be *to allow confiscation and destruction of vested rights in the older company which are always to be first considered.*"

(P. 734-735):

"If necessary, I would hold that, if such condemnation were attempted, the equity court would have full power to enjoin and stay the prosecution of any such proceeding at law until it had by its decree, fixed the location and character of the crossing to be condemned. I have deemed this discussion necessary in order to determine the contention of the electric company that it is entitled to have the crossing of its choice as a matter of right. * * *

"If then, this court must determine, as such seems to be the requirement of the law, the location of a crossing over defendant's tracks for this electric road, I feel constrained to say from the report of the engineers and the evidence in the case that such crossing should not be fixed or allowed at the point asked for by the electric company. Without discussing the evidence, it clearly shows that such crossing would be very dangerous to the railroad and to the public; that it would be very expensive to both roads, would very greatly impede the railroad company's necessary operations, and can be avoided. So far as crossing at First Street is concerned, I think it practicable, but undesirable, far better than the one sought, however."

186 Fed. 1022, *Elkins Ry. Co. vs. Western Md. Ry. Co.* Same case on appeal:

"PRITCHARD, Circuit Judge. The learned judge who heard this case below prepared an exhaustive opinion clearly setting forth the various points at issue. We have carefully considered the record and the evidence that was heard by the

court below, and in view of the facts and circumstances surrounding this case we are of opinion that the rulings of the lower court were eminently proper, in as much as the opinion of the lower court, reported in 163 Fed. 723, contains a full statement of the facts and deals with the various questions of law presented, we adopt the same as the opinion of this court. For the reasons stated, the decree of the lower court is affirmed."

CERTIORARI WAS DENIED ON THIS CASE, 223 U. S. 725.

141 Fed. 578, *So. Dakota Cent. Ry. vs. Chicago, M. & St. P. Ry. Co.*

"Although corporations engaged in business of a nature which requires them to serve the public are said to be public corporations, they are, in fact but private enterprises inaugurated for the benefit of their stockholders. While railroads are subject to use for the public benefit, they are owned, not by the public, but by corporations, which so far at least as ownership is concerned are private corporations. And if one such corporation may take the property of another, so as to deprive the latter of the use to which it was devoted, except in cases expressly authorized by the statute, or where public necessity demands such taking, there would be no reasonable limit to the conditions under which the power of eminent domain might be exercised. The full extent to which any of the courts have gone upon this subject is that the land appropriated to a particular public use is not, under all circumstances, withdrawn from liability to be taken by legislative authority in the exercise of the power of eminent domain for another public use, with this qualification, that a special grant cannot be construed to authorize subversion of the former use, unless such appears, by express words or by necessary implication, to be the legislative intent. As there is no statute in the state of South Dakota which authorizes the taking by one railroad of the right of way of another longitudinally, but the power granted is limited to the crossing or inter-

section of the right of way of another company and the uniting with its railroad, *the attempted condemnation proceedings of a portion of the right of way of the Milwaukee Company longitudinally cannot be sustained.*"

93 Pa. State, 159, *In re Pennsylvania Railroad's Appeal*:

This was a case in which the Pennsylvania Railroad attempted to take the property of a street railway in order to reach its depot. The Court said:

"Now the appellant admits that it has entered upon and for its own uses and purposes has destroyed part of the plaintiff's road, but it attempts to justify its action in that it was necessary for it so to do in order to reach its depot on Dock Street. But the question recurs—how came it that this warehouse was placed in such a position that it became necessary to enter upon and cross Dock Street in order to reach it? The answer is found in the testimony of Mr. Kneass, the assistant to the President of the Railroad Company. He says the whole block from Walnut to Dock Street and from Delaware Avenue to Water Street, excepting some stores fronting on Dock Street at the corner of Water Street, and at the corner of Delaware Avenue, was purchased for the use of a freight depot and the offices necessarily connected therewith. But we learn from the evidence of Mr. Trautwine, whose ability as an engineer no one doubts, that a practical entrance to this depot might be made either at the corner of Delaware Avenue, or at a short distance north of it. This, of course, would avoid any interference with the rights of the appellee. The appellant did not purchase or take as it might have done the property on the corner of Dock Street and Delaware Avenue and so was obliged to enter upon with its tracks and cross Dock Street in order to reach its warehouse. *The reason why this property was not purchased or taken is explained by the witness first above mentioned to have been that the necessities for that*

court below, and in view of the facts and circumstances surrounding this case we are of opinion that the rulings of the lower court were eminently proper, in as much as the opinion of the lower court, reported in 163 Fed. 723, contains a full statement of the facts and deals with the various questions of law presented, we adopt the same as the opinion of this court. For the reasons stated, the decree of the lower court is affirmed."

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section of the right of way of another company and the uniting with its railroad, *the attempted condemnation proceedings of a portion of the right of way of the Milwaukee Company longitudinally cannot be sustained.*"

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property were not imperative and the price therefor not satisfactory. He also says further on that the reason for not purchasing this property was one of economy merely. We thus discover that this necessity by which the unlawful acts of this company, appellant, are sought to be excused is one of its own making—**A MATTER OF ECONOMY.** It is cheaper to use Dock Street and the appellee's franchise than to buy the property above mentioned. **A DEFENSE MORE WEAK OR ONE MORE BARREN OF EQUITY COULD SCARCELY BE IMAGINED.**"

"The appeal was dismissed."

The Court will note that this case is on all fours with the case at bar. Neville admits that the route A-B into Jackson would be more direct and his reason for NOT taking that route was economy.

134 Fed. 973, *Evansville & H. Traction Co. vs. Henderson Bridge Co.*

"While a public service corporation, like a railroad company, is bound to render to the public certain services appropriate to its particular functions, it is not bound to permit its property to be subjected to use by a rival corporation, unless by express statutory enactment and by due process of law thereunder."

193 Ill. 217 (61 N. E. 1090), *Suburban R. R. Co. vs. Metropolitan R. R. Co.*:

In this case, one street railway company was attempting to condemn a portion of the line of another street railway company. The court said, on page 1092:

"But one corporation cannot take the property of another already devoted to a particular use for the purpose of applying it to the same use. *Where there is no change in the use, there cannot be a change in the ownership under the law of eminent*

domain. C. & W. Ry. Co. vs. C. & E. Ry. Co., 112 Ill. 589. In this case, the proposed use is the same. It appears that petitioner desires to connect with another surface railroad at 52nd Street and it is doubtless desirable to run across this property for that purpose without deflecting from the direction of its original line. *There is, however, no physical obstacle to its taking another route and reaching the surface without taking this 30-foot strip.*"

112 Ill. 589, *C. & W. Ry. Co. vs. C. & E. Ry. Co.*:

"In the absence of a clearly expressed intention to the contrary, the courts will not so construe a railway's charter as to authorize one company to take the property of another already devoted to a particular public use for the purpose of applying it to the same use. When there is no change in the use, it becomes a matter of mere private concern without at all affecting the public interest. This rule applies only when the taking would result simply in a change of ownership without affecting the use of the property sought to be taken."

214 Pa. 307 (63 Atl. 741) *Commonwealth, etc. Ry. vs. Bond*:

(Syllabus 2):

"Where a street railway is granted permission to lay its tracks in a street, allowing a later corporation to lay a part of its tracks on the tracks of the first company, **IS AN UNCONSTITUTIONAL TAKING OF THE PROPERTY OF THE FIRST COMPANY.**"

(P. 742):

"This court has decided that while the Legislature may in the exercise of the right of eminent domain take franchises and property engaged in a public use and apply them to another public use, *a statute cannot be sustained which confers upon one corporation for profit a right to appropriate the property of another corporation to exactly the same public uses for the convenience and profit of*

the younger corporation. P. & M. S. Ry. Co.'s Petition 203 Pa. 354 (54 Atl. 191). * * * The rule in these cases is based upon the principle that the granting of the use of the tracks of a former company to a later company was the taking of property of the former company for the convenience and profit of a younger corporation and **THEREFORE IS UNCONSTITUTIONAL.** The principle of these cases rule the case at bar. *To superimpose on the tracks of the former* company the whole, or any part of the tracks of a later company, is the taking of property of the former company within the meaning of the rule in the cases just cited. *There is no distinction in principle between the taking of the whole of the tracks of the former for the use of the later company and the taking of part of the tracks."*

203 Pa. 608 (53 Atl. 513) *Commonwealth et als. vs. Uwchlan St. Ry. Co.*

203 Pa. 354 (53 Atl. 191) *P. & M. St. Ry. Co.*:

(P. 192):

"The constitutionality of Section 14 with its amendment is denied. Can its constitutionality, under the settled law, be sustained? For whatever might be our opinion of the justice or wisdom of such legislation, we would not strike down an act of the legislature, a co-ordinate branch of the Government, who are as much bound to obey the fundamental law as we, unless the act palpably violates that instrument. We are in no doubt as to just what power the Legislature intended to confer by these acts. It was a clear grant of a right to the younger to enter upon the easement of the older company, and take possession of 2500 feet of its tracks, poles and wires, thereafter to use them for its corporate purposes. It is not material that this possession was not to be exclusive. *In whatever light it is viewed, it was an authority to appropriate to a certain extent the franchises and property of the older company.* In our earlier judicial history, it was sometimes

doubted whether the property of a corporation, used under its franchise for its own profit and the convenience of the public, could, under the right of eminent domain, be again appropriated by the State, or by a second corporation which had been granted the right of eminent domain; but it has long since been settled that all private property may be taken for public use; that all property not purely public is private, whether it belongs to an individual or a corporation, aggregate or sole; that while a corporation aggregate may be created for public purposes, and be granted rights and immunities only because it serves the public, yet, the purpose of the members is private profit to be realized by serving the public, and in that sense the franchise and property it acquires, whereby the individual profit accrues to each member of the corporation, are private property, and may be appropriated to another public use by the State. The substance of all the authorities (and they are many) is as stated by Chancellor Walworth, 3 Paige 73: 'Notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property remains in the government, or in the aggregate body of the people in their sovereign capacities; and they have a right to resume the possession of the property in the manner directed by the Constitution and laws of the State whenever the public interest requires it.' But in addition to the power resting on the state's inherent right of sovereignty, Section 3, Article 16, of our Constitution, declares: 'The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals.

"Therefore, the authority of the Legislature to confer on a corporation the right to take the franchise and property of an older corporation for public use cannot be questioned. Whether it be expedient or wise for the Legislature to exercise this authority to take property for public use is purely a political question, and one solely for the Legislature. But whether the use to which it

is sought to be appropriated, the property authorized to be taken *is a public use is a judicial question, for the determination of the courts. Bridge Co. vs. Dix,* 6 Howard 507; *City of Pittsburg vs. Scott,* 1 Pa. 309; *Jessup vs. Loucks,* 55 Pa. 350; *Appeal of Stewart,* 56 Pa. 413; *Appeal of P. N. & N. Y. R. R. Co.,* 120 Pa. 90; *Appeal of Edgewood R. R. Co.,* 79 Pa. 257; *Commission vs. Pa. Canal Co.,* 66 Pa. 41."

"In all these cases, the court decided whether the appropriation of the franchise of the older under the right of the eminent domain was a new and enlarged use for the benefit of the public and therefore such a 'public use' as brought it within the meaning of the Constitution. The first case cited (*Bridge Co. vs. Dix*), went to the Supreme Court of the United States on a writ of error to the Supreme Court of Vermont, the plaintiff in error averring that a statute of Vermont was in conflict with the Federal Constitution. The Bridge Co., in 1795, had been invested by the Legislature with the exclusive privilege of building a bridge over West River within four miles of its mouth, with the right to collect tolls from those passing over it, the franchise to continue for one hundred years. The corporation, under its franchise, constructed its bridge and enjoyed its profit until the year 1839, when another act was passed, authorizing the State Courts, whenever in their judgment the public good so required, to take any real estate, easement or franchise of another turnpike or other corporation for the purposes of a public highway —to observe, however, the same rules in making compensation as provided by law in other cases where property was taken for public uses. Upon the petition of Dix et als., proceedings were instituted for the construction of a public road or highway between certain terminals; the road passing upon and over the bridge, thus converting it into a free highway for all the public. Damages were assessed in favor of the Bridge Company, and paid into Court. The *Company denied the right of the Legislature to appropriate its franchise and property on the ground that such appropriation impaired its contracts with the State*

as implied by its charter, and therefore contravened the Constitution of the United States. The Vermont courts decided against the Company and their judgment was affirmed by the Federal Court. Three opinions were filed in the United States Supreme Court concurring in this judgment against the Bridge Company. It was held that the franchise and property of the company was subject to the right of eminent domain and could be taken for public use by the State without impairment of the contract relation with the State, **if the second use to which the property was devoted was another and more beneficial to the public than the old one;** that the use for which it was taken, although practically of the same kind as that made of the bridge before, was a public use, in that thereafter it became free to all the public, whereas before it was limited to those who could pay or were willing to pay tolls; that the use was enlarged and more beneficial to the general public when free from tolls. The case was ably argued by Mr. Webster for the plaintiff in error, and by Mr. Phelps, *contra.* The opinions by the three Justices, Daniel, Mclean and Woodbury, are very full and elaborate. Nearly all the questions raised are discussed, and the cases in the different states bearing on them cited. *It will be noticed from an examination of the report that counsel for the defendant in error concedes, and the court assumes, that the franchise could not have been taken from one corporation for profit under the right of eminent domain in the State and vested in another private corporation of the same kind for profit.* The public use is made to depend on the fact that thereafter it was to be free. It was, therefore, not a transfer of the franchise and property of one corporation for profit to another of like character, but a taking for purely public use. In the constitutions of nearly all the states, their bills of rights and eminent domain articles are substantially the same as ours. In all their courts, on questions such as the one before us (*Bridge Co. vs. Dix, supra*), has generally been cited and approved. It has been cited with approval in our own court in the cases already noted. *In re Towanda Bridge Co.*, 91 Pa. 216, is an exactly similar case in its

essential facts. It in effect decides that the growing necessities of a progressive age must be met by the exercise of the State's power of eminent domain. The public road appropriates the bridge path; the turnpike road, the public road; the electric railway, the turnpike road; the steam railroad, the canal bed. And so this court held so recently as *Harrisburg, C. & C. Turnpike Road Co. vs. Harrisburg & M. Elec. Ry. Co.*, 177 Pa. 585, 35 Atl. 850, 34 L. R. A. 600, where the railway company appropriated a small part of the road bed of the turnpike company under this same act of 1889; that the exercise of domain in that case was without doubt constitutional. The use was changed and greatly enlarged for the benefit of the public by the younger corporation. **BUT IN NO CASE HAVE I BEEN ABLE TO FIND IN ANY OF THE STATES A JUDICIAL JUDGMENT UPHOLDING THE RIGHT OF ONE CORPORATION, FOR PROFIT, TO APPROPRIATE THE PROPERTY OF ANOTHER TO EXACTLY THE SAME USES FOR THE CONVENIENCE AND PROFIT OF THE YOUNGER CORPORATION.**

* * *

"The same assumed power which gives the right to take property already appropriated under a grant can lawfully confer domain without restriction on property not so appropriated. In fact, there is no serious obstacle in the way of multiplying and constructing electric railways to meet every reasonable public demand for them. **IF THE NECESSARY COST OF CONSTRUCTION BE AN INSUPERABLE OBSTACLE,** unless property rights of like corporations be disregarded, **THEN THERE IS NOT THAT PUBLIC USE TO BE MET WHICH, WITHIN THE MEANING OF THE CONSTITUTION, WARRANTS THE GRANTING OF EMINENT DOMAIN.** A reasonable expectation of public patronage will always tempt investment of capital. If, however, under the law, the investment can be put in constant peril by the demands of a newer corporation for the property of the older, it may well be doubted whether, in the end, the public would not suffer from the refusal of capital to invest in improve-

ments for public use. Capitalists will take the risk that in the indefinite future their franchise and property may be taken to answer the public necessities and demands for a newer and more improved method of travel and communication. It is doubtful whether they would readily take the risk of the appropriation of their franchise and property by every organization instituted for precisely the same purpose under the general act of 1889; for there would then be no limit to the extent of the appropriation, except the cupidity of the new company and the will of the Legislature."

157 Mass. 364 (25 N. E. 92, 7 L. R. A. 765), *Cary Library vs. Bliss*:

Mary Cary died, giving to the Town of Lexington, certain money to be used in the acquisition of the "Cary Library". The library was acquired and operated and subsequently additional gifts were granted to it. Thereafter an attempt was made by the State to condemn it and take it over for a new library.

"1. Held that, by the acceptance of the terms of the gifts, the town and the trustees agreed to the scheme of management proposed by the donor; that these subsequent gifts were made with reference thereto; and that without the consent of all parties, in the absence of any necessity for a change of management, *the act was in violation of Const. U. S., Article* 1, *paragraph* 10, *providing that no State shall pass any 'law impairing the obligation of contract'.*"

"2. The statute further provided that the property, part of which consisted of money, should be taken, under the right of eminent domain 'to be held and applied in the same manner as if held by said trustees'. Held that, as there was no public necessity for the taking, THE LEGISLATURE COULD NOT AUTHORIZE IT."

On page 96, the Court said:

"The question arises whether *taking property*

from one party who holds it for a public use by another to hold it in the same manner for precisely the same public use can be authorized under the Constitution. Can such a taking be founded on a public necessity? It is unlike taking property for a public use which is already devoted to a different public use. There may be a necessity for that. In the first case, the property is already appropriated to a public use as completely in every particular as it is to be. Can the taking be found to be for the purpose which must exist to give it validity? In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the Legislature to say whether in a particular case the necessity exists. *We are of the opinion that the proceeding authorized by the statute was, in its nature, merely a transfer of property from one party to another, and not an appropriation of property to public use, nor a taking which was, or which could be found by the Legislature to be a matter of public necessity. Bridge Co. vs. Dix,* 6 How. 507; *Lake Shore & M. S. R. R. Co. vs. C. & W. R. Co.,* 97 Ill. 506; *C. & N. W. R. R. Co. vs. C. & E. R. R. Co.,* 112 Ill. 589. **FOR THESE REASONS, THE MAJORITY OF THE COURT ARE OF THE OPINION THAT THE STATUTE OF 1888, c. 342, IS NOT IN CONFORMITY WITH THE CONSTITUTION OF THE UNITED STATES."**

77 Conn. 83 (58 Atl. 467) *Star Burying Ground Assn. vs. North Lane Cemetery Assn.*:

"A statute authorizing the condemnation of land will not be construed as applying to land already devoted to a public use, unless such application is clearly covered by the statute. * * * a condemnation of land actually appropriated to and fully serving a public use, for the same use by a different owner, may be a condemnation only in form, and in reality be a mere compulsory transfer of the property from one private owner to another, *which it is beyond the power of the Legislature to provide for.*"

161 Mo. 288 (61 S. W. 684) *K. & T. C. Ry. Co. vs. N. W. C. & M. Co.*

Our opponents will undoubtedly contend that all of the law cited under this Section 1-B, and also the apprehension expressed in the petition and in this brief lest the Jackson & Eastern Railway Company can obtain by this condemnation proceeding the right to **"own, occupy and use"** a section of the main line track of the Alabama & Vicksburg Railway Company; and thereby sever the continuity of the Alabama & Vicksburg Railway Company's main line is without foundation or application, since the Supreme Court of Mississippi has held that the Jackson & Eastern's condemnation proceeding when properly construed does not seek to take more than an easement. We, however, point out that the Jackson & Eastern's condemnation petition which is quoted in the petition for certiorari, pages 7, 8 and 9, specifically says:

> "That the following **real property**, rights, privileges and easements are sought to be condemned for the purposes hereinafter stated, to-wit: **A strip of land** of varying widths, extending, etc."

specifically describing the strip of land, and then continuing:

> "Your applicant would further show that the public use for which the **strip of land**, rights, privileges and easements hereinabove described, is for a right of way for a switch track and the connection of said switch with the main line of the defendant, The Alabama & Vicksburg Railway Company, at the point above described; and your applicant further shows that it is necessary for it to **OWN, OCCUPY AND USE** said **STRIP OF LAND**, rights, privileges and easements above described in order to properly conduct its business

as a common carrier, for which purpose it was organized."

And the prayer of said condemnation proceeding reads:

"Wherefore, your applicant prays that such steps be taken for the condemnation of said **LANDS, rights, privileges and easement for the purposes aforesaid** as are required by Chapter 43, and Section 4096 of the Annotated Code of 1906 of Mississippi."

Petitioner further shows that Articles 1867 and 1868 of the Mississippi Code of 1906 read as follows:

"1867 (1692) JUDGMENT. Upon the return of the verdict, the Court shall enter a judgment as follows, viz.:

"'In this case the claim of (naming him or them) to have condemned certain lands named in the application, to-wit: (here describe the property), being the property of (here name the owner) was submitted to a jury composed of (here insert their names) on the .....day of....., A. C. ....., and the jury returned a verdict fixing said defendant's compensation and damages at .....dollars, and the verdict was received and entered. Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs for which execution may issue. J. P.'

"1868 (1693) RIGHTS OF APPLICANT AFTER THE JUDGMENT. Upon the return of the verdict and entry of the judgment, if the applicant pay the defendant whose due compensation is fixed by it, or tender to him the amount so found and pay the costs, he or it shall have the right to enter in and upon and take possession of the property of such defendant so condemned, and to appropriate the same to the public use defined in the

> application; and in case the defendant and his attorney absent themselves from the court, the payment may be made to the Clerk of the Circuit Court for him, and such officer shall be responsible on his bond therefor and shall be compelled to receive it."

and further points out that under the decision of the Supreme Court of Mississippi in this very case, 95 Sou. 733, the Supreme Court of Mississippi has said:

> "In other words in this case, the court construed the statute of eminent domain and adjudicated that the only question that could be decided in that proceeding was the amount of damages.
>
> "That the court could not decide the right of the plaintiff in such proceedings to institute the proceedings, nor could any question be raised than that of the amount of damages, and that the Circuit Court on appeal from the judgment of the eminent domain court had no greater right of jurisdiction than the eminent domain court had."

Under these circumstances, it seems apparent that as a result of the decision of the Supreme Court in dissolving petitioner's injunction and throwing it back defenseless into the eminent domain court, it has laid open to the Jackson & Eastern Railway Company a royal road specifically pointed out by Articles 1867 and 1868 of the Mississippi Code of 1906, whereby to invade petitioner's rights under the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States. The Jackson & Eastern Railway Company with this injunction dissolved will now proceed with the condemnation proceeding in strict accordance with the Mississippi statutes above referred to, and having paid in the amount ordered by the J. P. Court and its jury, will cause to be entered a judgment exactly in the terms prescribed

by Article 1867 of the Mississippi Code of 1906. That judgment will describe the strip of land which constitutes a part of the main line of the road bed and track of the Alabama & Vicksburg Railway Company and will give to the Jackson & Eastern Railway Company the right to own, occupy and use said property. The Alabama & Vicksburg Railway Company will be precluded by the express language of the decision of the Supreme Court of Mississippi from making any objection to this procedure and the language which the Supreme Court of Mississippi has used in 101 Sou. 553, will be entirely impotent to save the Alabama & Vicksburg Railway Company from the disaster which will result. It is because of this situation that the jurisdiction and assistance of this court is invoked.

II.

"WHEN A STATE CONDEMNATION STATUTE PREVENTS A DEFENDANT IN CONDEMNATION FROM RAISING IN THE CONDEMNATION SUIT ANY ISSUE WHATEVER, SAVE AS TO THE AMOUNT OF COMPENSATION TO BE PAID, THE CONDEMNATION DEFENDANT IS DENIED DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, IF THE CONDEMNATION PETITION FAILED CLEARLY TO DECLARE THE PRECISE PROPERTY AND THE PRECISE INTEREST THEREIN SOUGHT TO BE CONDEMNED, SINCE IN THE ABSENCE OF SUCH FREEDOM FROM AMBIGUITY

DEFENDANT CANNOT PROPERLY PREPARE AND PRESENT ITS VERY LIMITED DEFENSE.

The language of the condemnation proceeding has been copied in the petition for *certiorari* at pages 7, 8 and 9. It describes "a strip of land" and says:

> " • • • and your applicant further shows that it is necessary for it to **OWN, OCCUPY AND USE said strip of land, rights, privileges and easements, above described,** in order properly to conduct its business as a common carrier, for which purpose it was organized."

The said condemnation proceeding concludes with a prayer reading as follows (R. of Miss. S. C. 29, 386):

> "WHEREFORE, your applicant prays that such steps be taken for the condemnation of said **lands,** rights, privileges and easements, for the purposes aforesaid, as are required by Chapter 43, and Section 4096 of the Annotated Code of 1906 of Mississippi.
>
> "And as in duty bound, your applicant will ever pray."

The Chancellor who tried the case, in his opinion, said (R. p. 68):

> "It is the opinion of the Court that the eminent domain proceedings instituted by the defendant against the complainant seek to condemn greater right in the property of the A. & V. Railway Company than a mere easement for the purpose of making its junction and it is the opinion of the Court that the J. & E. Railway Company, defendant herein, is not entitled to acquire a dominant right of ownership in the property of com-

plainant under the law **and the application should be amended to that extent."**

Mr. Justice Anderson of the Supreme Court of Mississippi, in his dissenting opinion said (101 Sou. 556):

> "The bill of the Alabama & Vicksburg Railway Company ought to have been sustained, in my judgment on another ground, and that is that the eminent domain application of the Jackson & Eastern Railway Company **failed to sufficiently describe the right or easement it sought to condemn.** It is unquestioned that the Jackson & Eastern Railway Company has no right under the statute to condemn the fee in the tracks and right-of way of the Alabama & Vicksburg Railway Company for the junction. Where a lesser interest than the fee in land is sought to be appropriated in a condemnation proceeding, the lesser interest must be defined with such certainty as to apprise the owner of the nature and extent of the interest which is to be taken, and also with such certainty as to enable the jury to intelligently and according to law assess the compensation to be paid for the interest taken. *Pontiac Improvement Company vs. Board of Commissioners,* 104 Ohio State 447, 135 N. E. 635, 23 A. L. R. 866. Certainly the proceedings ought to be definite enough as to description of the right sought to be taken so that the owner of the fee will know how much he will have left after the proposed easement is taken. This is also necessary to enable the taxing authorities to properly assess the property. Unless what is taken by the condemnation proceedings is made definite how could the taxing authorities determine what assessment value to put on what was taken and what was left?

The Supreme Court of Mississippi said in this very case (95 Sou. 733):

> "The court construed the Statute of Eminent Domain and adjudicated that the **only question**

> **that could be decided in that proceeding was the amount of damages.** That the Court could not decide the right of the plaintiff in such proceedings to institute the proceedings, **nor could any other question be raised than that of the amount of damages,** and that the Circuit Court on Appeal from the judgment of the Eminent Domain Court had no greater right of jurisdiction than the Eminent Domain Court had."

From this it is apparent that unless the Supreme Court of Mississippi is reversed and that the condemnation proceeding is enjoined, petitioners will be deprived of their property without due process of law and denied the equal protection of the laws in contravention of the Constitution of the United States, particularly the Fourteenth Amendment. This is so, for the reason that unless the Supreme Court of Mississippi is reversed and petitioners' injunction is maintained, petitioners will be compelled to go before a jury of farmers with their hands tied so as to prevent their making any defense save on the question of amount of compensation and will have taken from them valuable property. **JUST WHAT PROPERTY WILL BE TAKEN IS THE SUBJECT OF A DIFFERENCE OF OPINION AMONG THE MISSISSIPPI JUDGES THEMSELVES. This being so, CERTAINLY THE JURY WILL NOT AND CANNOT KNOW JUST WHAT PROPERTY IS BEING TAKEN;** and petitioners, unless this fact is ascertained and made certain in advance, cannot make proper proof of their damages and cannot receive due process of law and the equal protection of the laws.

See *Pontiac Improvement Company vs. Board of Commissioners,* 135 N. E. 635 (23 A. L. R. 866); Ohio 1922:

"'Where a lesser interest than a fee in real estate is sought to be appropriated in a condemnation proceeding by a municipality or board for public use, the lesser interest must be defined with such certainty as to apprise the owner of the nature and extent of the interest which is to be taken and also with such certainty as will enable a jury in accordance with the Constitution to intelligently assess the compensation to be paid for the interest taken.' For lack of such certainty the Ohio Court enjoined this condemnation proceeding."

20 C. J. Par. 6: DESCRIPTION OF PROPERTY, AND LOCATION AND NATURE OF IMPROVEMENT.—(a) In General. The petition in condemnation proceedings must describe the property sought to be taken, defining the location and quantity required with such certainty that it may be identified, and the extent of the petitioner's claim made known to the owner, and a failure of the petition, complaint or application to thus describe the property, or any uncertainty in this respect, will vitiate the proceedings, unless an amendment of the description is allowed."

III.

UNTIL A RAILROAD HAS OBTAINED A CERTIFICATE OF PUBLIC NECESSITY FROM THE INTERSTATE COMMERCE COMMISSION, IT CANNOT BUILD A NEW LINE OR CONNECT WITH AN ESTABLISHED LINE. NOR CAN IT AFTER OBTAINING SUCH A CERTIFICATE, DEVIATE FROM THE ROUTE THEREIN INDICATED WHEN BUILDING THE NEW LINE. NOR CAN IT RESORT TO STATE AGENCIES TO FORCE A JUNCTION WITH ANOTHER RAILROAD AT A POINT NOT ON THE ROUTE NAMED IN THE CERTIFICATE OF PUBLIC

NECESSITY WITHOUT VIOLATING THE OTHER RAILROAD'S RIGHTS, PRIVILEGES AND IMMUNITIES UNDER THE INTERSTATE COMMERCE ACT AS AMENDED BY THE TRANSPORTATION ACT OF 1920.

The Court will recall that Art. 18, Sec. 1 of the Interstate Commerce Act provides:

> "No carrier by railroad subject to this Act, shall undertake the extension of its line of railroad, or the construction of a new line of railroad, shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over and by means of such additional or extended line of railroad unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction and operation of such additional or extended line of railroad."

The Jackson & Eastern Railway Company recognized in this instance the authority of this Section and sought and obtained from the Interstate Commerce Commission a certificate which is in the record as Respondent's Exhibit II and which shows that the line authorized by the Interstate Commerce Commission was to be built **FROM SEBASTOPOL, MISSISSIPPI, TO JACKSON, MISSISSIPPI, NOT TO CURAN'S CROSSING,** and said record shows conclusively that Curan's Crossing is not an intermediate point on the line between Sebastopol and Jackson, Mississippi. See 298 Fed. 488, *Lancaster vs. G. C. & S. F. R. R.*, where the Court stressed the necessity of obtaining consent from the Interstate Commerce

Commission prior to the construction of a new line of railroad between any two points.

However, President Neville contended below, that because he filed a map with his application to the Interstate Commerce Commission which he says shows he intended to go to Curan's Crossing and thence by the A. & V. Ry. Co. rails to Jackson, Mississippi, the Interstate Commerce Commission when it issued the order authorizing him to build from Sebastopol, Mississippi, to **JACKSON, MISSISSIPPI,** thereby authorized him to build from Sebastopol, Mississippi, to Curan's Crossing and thence, to use the A. & V. line to Jackson, Mississippi. The plain and complete answer to this is that after filing his petition and map, President Neville filed a second petition with the Interstate Commerce Commission, which is to be found in the Record at page 103, in which second petition the Jackson & Eastern Railway Company asked leave to use the Alabama & Vicksburg Railway Company's line from Curan's Crossing into Jackson, Mississippi.

On receipt of this second petition, the Interstate Commerce Commission wrote to President Neville the letter, Exhibit 1, page 940, in which they said that they could not give him that right, thus conclusively demonstrating that both President Neville and the Interstate Commerce Commission construed the certificate of public necessity theretofore issued by the Interstate Commerce Commission as meaning what it said, namely, that the Jackson & Eastern Railway Company was authorized to build from Sebastopol, Mississippi, to Jackson, Mississippi, **but was not authorized** to build from Sebastopol to Curan's Crossing, Mississippi, and to

use thence the A. & V. Railway line to Jackson, Mississippi. The direct line between Sebastopol and Jackson, Mississippi, is considerably to the north of Curan's Crossing and by using that direct route the Jackson & Eastern Railway Company would reduce its distance into Jackson, Mississippi, by a mile and a half or more. This affirmatively appears from the record. See Map Exhibit B to Duffy's testimony, where the direct line has been drawn between the points (a)-(b) and the Map Exhibit A to Duffy's testimony, where the direct line has been drawn between the points (1)-(2) to Duffy's testimony. See also the testimony of Mr. Hayden, Vol. III, p. 671, and Mr. E. Ford, Vol. III, p. 696, and Mr. E. M. Durham, Vol. IV, p. 789, and Mr. Duffy, Vol. II, p. 460.

This testimony makes it plain that if the Jackson & Eastern Railway Company wishes to go direct to Jackson, Mississippi, as authorized in the Order of the Interstate Commerce Commission, its best route would be the route along the line (1)-(2) marked out by Hayden on Exhibit A of Duffy's testimony. If it wishes to go to a connection with the Alabama & Vicksburg Railway Company then its best route is to utilize the route actually surveyed under directions of Mr. E. M. Durham, Jr., which route, Mr. Durham has sworn, would be a cheaper one to build and a cheaper one to maintain for the Jackson & Eastern Ry. Co. In neither case is it proper or necessary to incur the hazards and difficulties of **CURAN'S CROSSING.**

This record shows without contradiction that when the Jackson & Eastern Railway Company filed its application with the Interstate Commerce Commission for a

certificate of public necessity for a line from Sebastopol, Mississippi, to Jackson, Mississippi, the Alabama & Vicksburg Railway Company made no appearance and it opposed no objection because it did not think that it was interested. Had the Jackson & Eastern Railway Company, at that time, applied for a certificate of public necessity from Sebastopol, Mississippi, to Curan's Crossing, Mississippi, the ALABAMA & VICKSBURG RAILWAY COMPANY would have been entitled to notice and would have been entitled to be heard before the Interstate Commerce Commission in opposition to the issuance of such a certificate and it would certainly have availed itself of that opportunity and would have opposed the issuance of the certificate. If now, the Jackson & Eastern Railway Company is allowed under the aegis of a certificate of public necessity authorizing it to build from Sebastopol, Mississippi, to Jackson, Mississippi, to utilize a State condemnation court for the purpose of building a line from Sebastopol, Mississippi, to Curan's Crossing, Mississippi, the ALABAMA & VICKSBURG RAILWAY COMPANY has been deprived of its opportunity to be heard before the Interstate Commerce Commission in opposition to such a project. The vindication of this right, privilege and immunity which it has under the Interstate Commerce Act, as amended by the Transportation Act of 1920, is what the ALABAMA & VICKSBURG RAILWAY COMPANY is seeking from this Court, in this proceeding.

For these reasons, it is respectfully submitted that the prayer of the Alabama & Vicksburg Railway Company's petition for *certiorari* should be granted and the

decision of the Supreme Court of Mississippi in this case should be reviewed by this tribunal.

Respectfully submitted,

R. H. THOMPSON,
A. S. BOZEMAN,
S. L. McLAURIN,
MONTE M. LEMANN,
J. BLANC MONROE,
Counsel for Petitioners.

February, 1925.

No. 244.

IN THE

United States Supreme Court

OCTOBER TERM 1925.

WRIT OF ERROR AND CERTIORARI TO SUPREME COURT OF THE STATE OF MISSISSIPPI.

MISSISSIPPI.

THE ALABAMA & VICKSBURG RAILWAY COMPANY, ET AL.,
Plaintiffs in Error and Petitioners,

versus

JACKSON & EASTERN RAILWAY COMPANY,
Defendant in Error and Respondent.

ORIGINAL BRIEF ON BEHALF OF PLAINTIFFS IN ERROR AND PETITIONERS.

R. H. THOMPSON,
A. S. BOZEMAN,
S. L. McLAURIN,
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Attorneys.

MONROE & LEMANN,
Of Counsel.

February, 1926.

Hauser Ptg. Co., "The Legal Printers," 720 Poydras St., New Orleans.

TABLE OF CASES.

N. B.

MR. NEVILLE, the defendant's president, testified, p. 499:

> "Q. Do you know, Mr. Neville, of any instance that you can name to me in which there has been established a junction between two railroads at a point which was on the outside of a curve, on a 10-foot fill, between two 400-foot trestles, in the immediate vicinity of a highway crossing, and in the flood reach of an unruly river?
>
> "A. I don't know as there is such a one anywhere else in the world."

MR. DURHAM, chief engineer U. S. Railroad Administration, testified, p. 616:

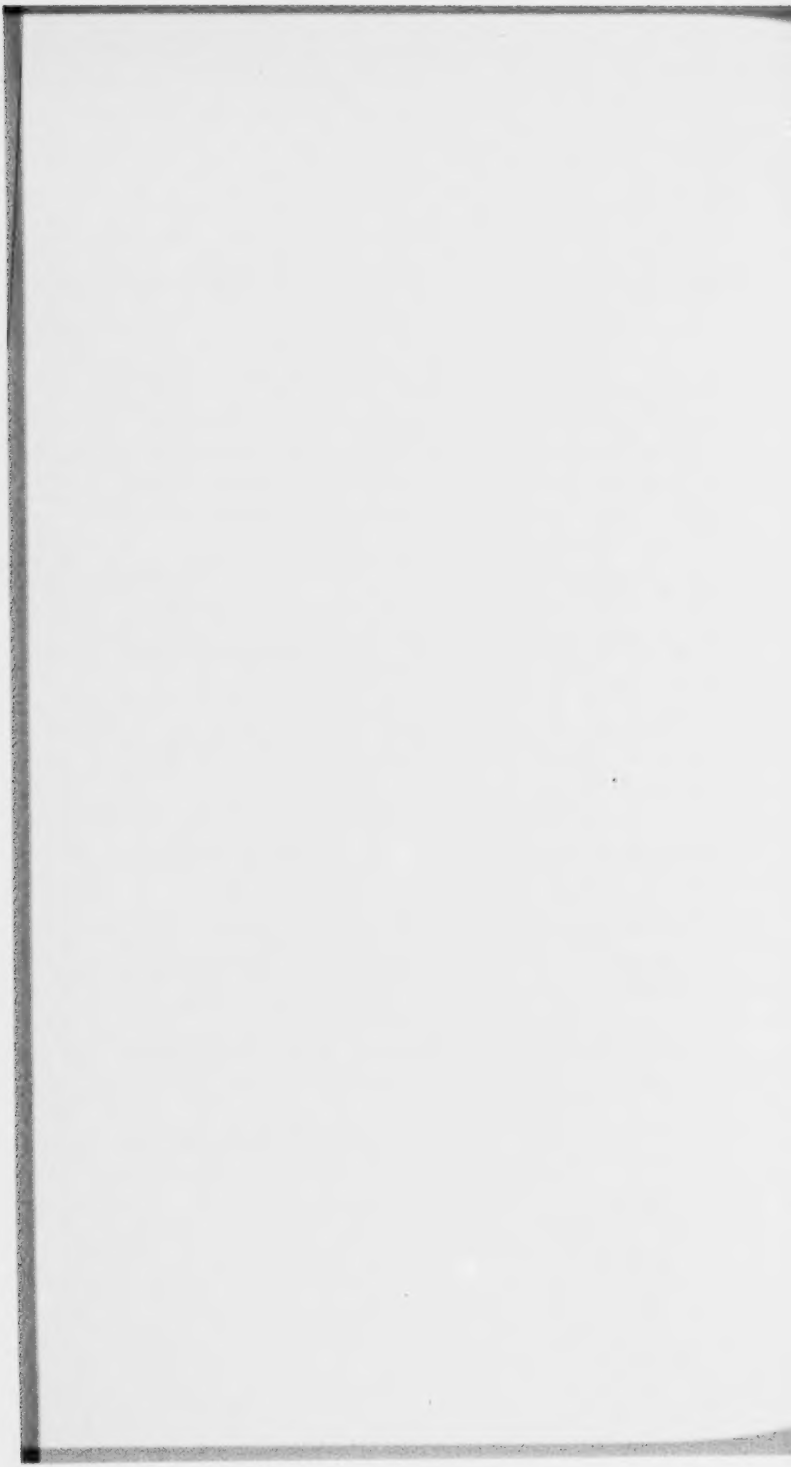
> "In my opinion it would be difficult to find a worse location for this junction between Pearson and Pearl River."

MR. WOODS, chief engineer So. Ry. lines west, testified:

> P. 204. "It is decidedly undesirable."
>
> P. 214. "In that case I see no excuse whatever for such a connection as this."

MR. EVANS, general chairman R. R. Conductors, swore, p. 110:

> "My opinion is that it is a death trap for the men employed to do the work there."



SUBJECT INDEX.

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Plaintiffs in Error and Petitioners,
versus
JACKSON & EASTERN RAILWAY COMPANY,
Defendant in Error and Respondent.

ORIGINAL BRIEF ON BEHALF OF PLAINTIFFS IN ERROR AND PETITIONERS.

If the Court Please:

This case has been brought here by the ALABAMA & VICKSBURG RAILWAY COMPANY, the trustees under its mortgages and its appeal bondsmen, to review two decisions of the Supreme Court of Mississippi: (95 Southern 733, R. P. 28, and 101 Southern 553, R. P. 677), dissolving an injunction sued out by them, whereby the JACKSON & EASTERN RAILWAY COMPANY

was restrained from proceeding to condemn certain property of the A&V Railway Company in a justice of the peace court, under a Mississippi statute which allows a defendant in such a proceeding to raise only one question, namely, the question of the amount to be paid to the defendant.

It is here, both on writ of error (R. p. 698) and by certiorari (see petition, notice, brief, etc.).

SUMMARY OF FACTS.

(1) The controversy arose out of an attempt of the Jackson & Eastern Ry. Co. to condemn in a justice of the peace court in Mississippi what the A&V Railway Company contends is the A&V Railway Company's main line track, for the purpose of making a connection with the A&V Railway Co. at a point which in the opinion of two of the most eminent and disinterested engineers of the country (Mr. E. M. Durham, Jr., E. p. 400, chief engineer U. S. Railroad Administration; and Mr. A. A. Woods, R. p. 201, chief engineer Southern Railway Co.), is entirely improper as a location for a junction.

The proposed location has been unanimously and vehemently objected to by the trainmen of the A&V Railway Co. whose duties will compel them to risk their lives in operating over it (R. p. 109-110-129-130-596) **AS A DEATH TRAP** and not a single Jackson & Eastern Ry. Co. trainman who will handle trains over the junction has taken the stand to deny this.

The proposed location has been shown to be:

1. On a curve, hence dangerous.

2. On an eight-foot fill, hence more dangerous.

3. Adjacent to an already dangerous road crossing, at grade, hence still more dangerous.

4. Between two 400-foot trestles, which the trains must hang over while stopping at the proposed junction.

5. In the flood area of Pearl River, hence continuously threatening both roads with a washout.

(2) It has been shown, without contradiction, that there is an entirely safe and proper place for a junction less than three miles from this highly objectionable proposed junction point. Mr. Durham has testified without contradiction that this safe junction will be cheaper to build and cheaper to maintain (R. p. 403), and the A&V Ry. Co. has expressed its willingness to co-operate in making the junction at this safe place.

(3) The record shows that the reason that the J&E Railway Co. was unwilling to use this safe junction point but sought through the intervention of the justice of the peace court, (where the hands of the A&V Railway Co. would be tied) to secure this unsafe and dangerous junction point, was as follows:

a. The location engineer of the J&E Railway Co., Mr. Stacker, testified (R. p. 331):

> "Q. Had you in mind in coming to this point nothing in regard to the bridge of Pearl River?
> "A. The bridge of the A&V Railway Co.?
> "Q. Was that considered by anybody?
> "A. The consideration was that we would be enabled to make arrangements with the A&V Railway and cross the river by the A&V bridge.

"Q. And did that consideration weigh with you in locating the proposed juction point?

"A. We wanted a junction with the A&V Railway so *that we could use the A&V Railway* track and bridge, a portion of the track west of the river, until we could enter Commerce street."

Such a user could, of course, only be obtained, if at all, through the Interstate Commerce Commission.

b. The President of the J&E Railway Co., Mr. Neville, virtually admitted: (R. p. 505, 470 and 507);

That in seeking this dangerous and improper junction point, he had in mind not the merits of the junction point, but the following ulterior motives:

(I) Persuading the Interstate Commerce Commission to permit the J&E Railway Company to use the main line track of and the terminal facilities of the A&V Railway Company.

(II) Thereby to make the Interstate Commerce Commission more inclined to recognize the J&E Railway Co. as a link in a system of consolidated connecting carriers.

(III) Thereby to secure an order from the Interstate Commerce Commission forcing the A&V Railway Co. to handle J&E Railway business into and out of Jackson, Miss., on a switching charge.

(4) Having all this in mind, the J&E Railway sought to condemn a portion of the A&V Railway Company's main line by a proceeding before a Justice of the Peace, knowing that the Supreme Court of Mississippi had held that the defendant in such a proceeding could

raise only one issue, namely, the question of the amount of the damages to be paid to the defendant.

In its opinion in this very case, the Supreme Court *of the State of Mississippi has said, (R. p. 35), dealing* with its own previous decision in *Vinegar Bend Lumber Co. vs. Oak Grove R. R. Co.*, 89 Miss. 84, 43 Sou. 292:

> "In other words, in this case, the court construed the Statute of Eminent Domain and adjudicated that the only question that could be decided in that proceeding was the amount of damages; that the Court could not decide the right of the plaintiff in such proceedings to institute the proceedings, nor could any other question be raised than that of the amount of damages, and that the Circuit Court on Appeal from the judgment of the Eminent Domain Court, had no greater right of jurisdiction than the Eminent Domain Court."

(5) In seeking this point of junction, the J&E Railway Co. disregarded the fact that its certificate of Public Necessity (R. p. 563) did not authorize it to build from Sebastopol its point of origin to Curan's Crossing but obligated it to build from Sebastopol to Jackson, Miss. That certificate of Public Necessity reads in part as follows:

> "It is hereby certified that the present and future public convenience and necessity require or will require the construction of an extension of the line of the J&E Railway from Sebastopol to Jackson, etc."

(6) In seeking this point of junction, the Jackson & Eastern has appealed to local prejudice and sympathy by boldly stating that it will build the road in the way

it wishes it built, or will refuse to build it at all. Its attitude towards the community in which the line is proposed to be built is "Let me build this line in my own way, at whatever cost or expense or danger to the A&V Railway Company, its property and its operatives or I will not build it at all." And the community has wanted the Railroad built.

On this foundation, this case comes to this Court, on the following issues raised by the eleven assignments of error, (R. p. 694 *et seq.*) and the points raised in the petition of certiorari.

SUMMARY OF ISSUES.

I.

The Interstate Commerce Act as amended by the Transportation Act 1920, especially section 3, paragraphs 3 and 4, and Section 5, dealing with consolidations vest in the Interstate Commerce Commission exclusive jurisdiction of track connections between interstate carriers. No state tribunal may order such connections or fix the relative rights of interstate carriers thereat.

II.

When a State condemnation Statute prevents a defendant in condemnation from raising in the condemnation suit any issue whatsoever, save as to the amount to be paid, the condemnation defendant is denied due process of law and the equal protection of the law guaranteed by the Fourteenth Amendment, if the petition for condemnation fails to declare clearly the precise property and the precise interest therein sought to be con-

demned, since in the absence of such freedom from ambiguity, the defendant cannot properly prepare and present its limited defense.

This point is strikingly illustrated in the case at bar, since the Mississippi Judges have themselves been unable to agree as to what property the plaintiff in condemnation was seeking to acquire.

III.

No tribunal State or Federal can transfer any essential section of the main line track of one interstate carrier to another interstate carrier for a like purpose without violation of the Fourteenth Amendment and the Contract Clause of the Constitution of the United States.

IV.

Until a railroad has obtained a certificate of public necessity from the Interstate Commerce Commission in accordance with the requirements of the Federal Interstate Commerce Act, it cannot build a new line or connection with an established line, nor can it, after obtaining such a certificate deviate from the route therein indicated in building the new line; nor can it resort to state agencies to force a junction with another railroad, at a point not on the route named in the certificate of Public Necessity without violating that other railroad's rights, privileges and immunities, under the Constitution of the United States and under the Interstate Commerce Act as amended by the Transportation Act 1920.

V.

Certainly no state agency has the right to impose upon an important interstate carrier a condition which will make it dangerous to the life and limb of its employees and its passengers for it to operate its trains. The attempt to impose such a condition upon it is a violation of its rights under the Federal Constitution particularly the Commerce Clause and the Contract Clause and under the Interstate Commerce Act as amended by the Transportation Act 1920.

VI.

The provisions of the Constitution and Statutes of the State of Mississippi to the extent that they have been held by the Supreme Court of Mississippi to authorize the doing of these things, are unconstitutional as being violative of the Federal Constitution, particularly the Commerce Clause, Art. I, Section 8, Par. 3; the Contract Clause, Art. I, Section 10, Par. I; the Fourteenth Amendment and the Federal Interstate Commerce Act as amended by the Federal Transportation Act 1920.

DETAILED STATEMENT OF FACTS.

The Alabama & Vicksburg Railway Company is a standard Class 1 Railroad, owning and operating a standard line of railroad whereon it is engaged continuously in the transportation of interstate and intrastate passengers, freight, express and mail. It being one of the old, well-established and important carriers in the southeast of the United States. R. p. 92.

The Jackson & Eastern Railway Company is a

comparatively new, unimportant and small railroad company incorporated in 1915, for the purpose of owning and operating a railroad from Union, Mississippi, to Jackson, Mississippi, a large part of which prospective line is still unbuilt. The Jackson & Eastern Railway Company is also engaged in interstate and intrastate commerce. (R. p. 538.)

A&V RAILWAY CO.'S MAIN LINE SOUGHT TO BE TAKEN;

ITS CONTINUITY DESTROYED.

In February, 1922, when the line of the J&E Ry. Co. had been constructed only from Union, Mississippi, to Sebastopol, Mississippi, a town about forty miles from a point on the A&V Ry. Co.'s railroad called Curan's Crossing, the J&E Ry. Co. filed a petition seeking by hearing in a justice of peace court to condemn property of the A&V at Curan's Crossing, described in the said petition as follows (R. p. 607):

> "3. That the following **REAL PROPERTY**, rights, privileges and easements are sought to be condemned, for the purposes hereinafter, stated, to-wit: **A STRIP OF LAND OF VARYING WIDTHS**, extending from Station 0/00 on the enumeration of the applicant, the Jackson & Eastern Railway Company, which 0/00 station is located on the center line of the Alabama & Vicksburg Railway Company's track 1797 feet east from the first block signal semaphore east of the Alabama & Vicksburg Railway Company's bridge over Pearl River in an easterly direction along the surveyed line of the Jackson & Eastern Railway Company an average distance of 325 feet, the widths of said strip to

be condemned are: At Station 0/00, 16 feet, being 8 feet on each side of the center line; at Station 0/50, 21 feet, being 8 feet on the right and 13 feet on the left side of the center line of the Jackson & Eastern Railway Company's survey; at Station 1/00, 26 feet, being 8 feet on the right and 18 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 1/50, 27 feet wide, being 9 feet on the right and 18 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 2/00, 30 feet wide, being 11 feet on the right and 19 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 2/50, 35 feet wide, being 15 feet on the right and 20 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 3/00, 30 feet wide, being 20 feet on the right and 10 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 3/25, 20 feet wide, being all on the right of the center line of the Jackson & Eastern Railway Company's survey; and at Station 3/75 coming to a point on the north right of way line of the Alabama & Vicksburg Railway Company's said survey, CONTAINING TWO HUNDRED AND THIR-TWO THOUSANDTHS (.232) ACRES, and lies in the NE¼ of the NW¼, Section 14, Township 5 North, Range East, Rankin County, Mississippi, which said center line of the proposed track of the appellant, the Jackson & Eastern Railway Company, is more fully shown by a diagram hereto attached, marked Exhibit "A", and made a part hereof. R. of Miss. S. C. 28, 385.)

"4. Your applicant would further show that the public use for which the strip of land, rights,

> **privileges and easements hereinabove described, is for a right of way for a switch track and the connection of said switch with the main line of the defendant, the Alabama & Vicksburg Railway Company at the point above described; and your applicant further shows that it is necessary for it to OWN, OCCUPY AND USE SAID STRIP OF LAND, rights, privileges and easements above described,** in order properly to conduct its business as a common carrier, for which purpose it was organized."

The said condemnation petition concludes with a prayer reading as follows, R. p. 610:

> **"Wherefore,** your applicant prays that such steps be taken for the condemnation of said **LANDS, rights, privileges and easements,** for the purposes aforesaid, as are required by Chapter 43, and Section 4096 of the Annotated Code of 1906 of Mississippi.
>
> **"And as in duty bound your applicant will ever pray."**
>
> *Bold-face type by present writer in above quotations.*

THE LAND THUS SOUGHT TO BE CONDEMNED CONSTITUTES A SECTION OF THE A&V RAILWAY COMPANY'S MAIN LINE TRACK, and if the Jackson & Eastern Railway Company acuires the right to **"OWN, OCCUPY AND USE THE SAID STRIP OF LAND,"** the continuity of the A&V Railway Company's railroad will be destroyed and instead of one continuous line of road from Meridian, Mississippi, to Vicksburg, Mississippi, will own two disconnected pieces of track separated by land of the

Jackson & Eastern Railway Company. The land described in the condemnation petition was by the J&E Railway's own engineers at the request of petitioner's counsel, cross hatched on a blue print of petitioner's main line as per Exhibit "A" attached, as page 9 to the petition for certiorari herein where it appears as a wedge-shaped area bisecting petitioner's "main line to Meridian, Mississippi", and actually embracing the embankment, ties and rails of petitioner's said main line. See L. W. Duffy's testimony (R. p. 283).

PROPOSED JUNCTION DANGEROUS.

The proposed location has been shown to be entirely improper as a point of connection between the Alabama & Vicksburg Railway Company and the Jackson & Eastern Railway Company in that:

A. **On a curve.** At the proposed point of connection the two railroads would approach each other on opposing curves.

(a) Thereby impeding the views of the junction of the crews of the trains approaching it on each line, thus increasing the chances of accident.

(b) Thereby making it necessary either not to elevate the outside rails of the tracks, a safety measure usually adopted on railroad curves, or else to have said tracks approach each other in opposing planes, in either case increasing the danger of accident.

(c) Thereby making it necessary to cut for a switch connection, the outer rail of a curve, thereby entailing danger of derailment by a switch splitting since centrifugal force would press the car wheel flanges closely against the outside rail and

tend to cause them to catch in and split the switch inserted therein. Durham (p. 616); Woods (p. 203); Stamm (p. 145); Jones (p. 86); Ford (p. 374).

(B) ON A FILL.

At the proposed point of connection, the two railroads would each be on a 10-foot embankment, thus materially increasing the danger, difficulty and expense of installing, maintaining and operating the proposed connection. Durham (p. 616); Woods (p. 203); Stamm (p. 14); Jones (p. 88); Ford (p. 375).

(C) AT A HIGHWAY CROSSING.

The proposed point of connection would be immediately adjacent to and would materially increase the hazard at an already dangerous and much-used highway crossing at grade over the Alabama & Vicksburg Railway Company's tracks. Durham (p. 616); Woods (p. 204); Stamm (p. 144); Jones (p. 91); Ford (p. 374).

(D) BETWEEN TWO TRESTLES.

The point of connection would be between two trestles in the track of the Alabama & Vicksburg Railway Company, each about 400 feet in length and so close together that an Alabama & Vicksburg Railway Company train stopping with its locomotive at the proposed connection, would necessarily extend over one or the other of these trestles, thus endangering and obstructing its operatives in the handling of the trains and any passengers entering or alighting therefrom. Durham p. 618, 619; Woods (p. 203), Stamm (p. 145), Jones (p. 89), Ford (p. 374).

(E) IN THE FLOOD AREA.

The proposed point of connection would be in the flood area of the valley of Pearl River and the building by the Jackson & Eastern Railway Company of an embankment and line at that point would necessarily concentrate the flood waters of Pearl River on already exposed points of the Alabama & Vicksburg Railway Company's tracks, thus increasing the height of the flood against already exposed portions of the Alabama & Vicksburg Railway Company's embankment and increasing the danger of washout of that embankment by Pearl River. Durham (p. 617), Woods (p. 203), Stamm (p. 146), Jones (p. 90), Ford (p. 378).

The force and validity of these objections was testified to by disinterested witnesses of national prominence in railroad matters including Mr. E. M. Durham, (R. p. 615), formerly chief of the Engineering Department of the U. S. Railroad Administration, and Mr. A. A. Woods, (R. p. 241), Chief Engineer of lines west of the Southern Railway Company. The defendant's own witnesses admitted that it would be preferable to have a junction where there was no curve, no fill, no public road crossing, no trestles or no high water. See Neville, p. 495; Duffee, p. 265; Stacker, pp. 307, 308, 309; and amitted that these disadvantages were present at the proposed junction; Duffee, p. 254. Mr. Neville, president of the J. & E., testified, p. 499:

> "Q. Do you know, Mr. Neville, of any instance that you can name to me in which there has been established a junction between two railoroads at a point which was on the outside of a curve, on a 10-foot fill, between two 400-foot trestles, in

the immediate vicinity of a highway crossing, and in the flood reach of an unruly river?

"A. **I DO NOT KNOW AS THERE IS SUCH A ONE ANYWHERE ELSE IN THE WORLD."**

Mr. E. M. Durham presented an actual survey showing that the J&E Ry. Co. could come to a junction with the A&V Ry. Co. at a point distant less than three miles from the proposed junction, which point would be free of all of the objectionable features present at the point of junction proposed by the Jackson & Eastern Railway Company. This survey showed and Durham (R. p. 402, 403) testified that the route of the J&E Ry. Co. to the safer junction would be **ACTUALLY CHEAPER** for the Jackson & Eastern Railway Company **TO BUILD** and **CHEAPER FOR IT TO MAINTAIN.** Defendant's witnesses made no attempt to contradict this.

DETAILED STATEMENT AND ARGUMENT OF ISSUES.

ISSUE NO. 1.

THE INTERSTATE COMMERCE ACT, AS AMENDED BY THE TRANSPORTATION ACT 1920, ESPECIALLY SECTION 3, PARAGRAPHS 3 AND 4, VESTS IN THE INTERSTATE COMMERCE COMMISSION EXCLUSIVE JURISDICTION OF TRACK CONNECTIONS BETWEEN INTERSTATE CARRIERS NO STATE TRIBUNAL MAY ORDER SUCH CONNECTIONS OR FIX THE RELATIVE RIGHTS OF CARRIERS THEREAT.

Plaintiffs in error and petitioners in their pleadings and assignments set up:

a. That both plaintiff and the defendant were engaged in interstate commerce.

b. That the Federal Interstate Commerce Act, Sec. 3, Paragraphs 3 and 4, as amended by the Transportation Act of 1920, vested in the Interstate Commerce Commission the exclusive right to compel connections and the use of terminal facilities and other property by and between railroads engaged in interstate commerce; and that this exclusive power in the Interstate Commerce Commission necessarily precluded any State, or any tribunal or agency thereof from exercising such power.

c. That to allow defendant to proceed with its condemnation proceedings in the State tribunal was an interference with and denial to petitioner of its rights, privilege or immunity under said Federal Statutes, and under the Commerce Clause, the Contract Clause and the 14th Amendment of the U. S. Constitution.

d. That the provisions of the Constitution and Statutes of the State of Mississippi to the extent that they have been held by the Supreme Court of Mississippi to authorize the making of a track connection between two interstate carriers, either with or without the ultimate purpose of securing advantages only allowable by the Interstate Commerce Commission are illegal, null and void, as in contravention of the Federal Constitution, particularly the Commerce Clause, Art. I, Sec. 8, p. 3; the Contract Clause, Art. I, Sec. 10, p. 1; the Fourteenth Amendment and the Interstate Commerce Act as amended by the Transportation Act 1920.

Said rights, privileges or immunities claimed by petitioner under said Federal Constitution and Statutes were denied to it by the State Court and the validity of the Statutes assailed was maintained. The error of that

denial is aggravated and the fact that the Interstate Commerce Commission's exclusive jurisdiction should have been recognized is accentuated by the fact that the case presented is a case in which:

a. Two interstate carriers have disagreed as to the location of a junction point whereat there is to be afforded reasonable, proper and equal facilities for the interchange of traffic between their respective lines.

b. Two interstate carriers have disagreed as to the rights in or to the first carrier's property, which the second carrier can acquire at such junction.

These are two questions which the Interstate Commerce Sommission under the Interstate Commerce Act as amended particularly Section 3, paragraphs 3 and 4, is specially vested with authority to determine.

c. The carrier seeking the condemnation frankly admits that its reason for seeking to condemn the property in question, was that it hoped thereby to secure (1) the right to use the costly bridge and main line track into Jackson, Mississippi, of the defendant in these proceedings (2) the right to get from the Interstate Commerce Commission an order directing the A&V Railway Company to handle its Jackson business on a switch movement and switching charge; (3) the right to be considered by the Interstate Commerce Commission as a link in a system of consolidated carriers.

These three rights could be given it, if at all, only by the Interstate Commerce Commission under the Interstate Commerce Act as amended by the Transportation Act of 1920.

(1) The testimony making these admissions is in part as follows:

Mr. Stacker, the locating Engineer of the J&E Railway Company, testifies (R. p. 331):

"Q. Mr. Stacker, Mr. Duffee testified that they started out to run a line of railroad from Sebastopol to Jackson. Why didn't you run your road to Jackson?

"A. Well, we run the line very close to Jackson. We considered that we would be practically at Jackson. We are going towards Jackson.

"Q. Had you in mind in coming to this point anything in regard to the bridge of Pearl River?

"A. The bridge of the A&V?

"Q. Was that considered by anybody?

"A. The consideration was that we would be enabled to make arrangements with the A&V and cross the river by the A&V bridge.

"Q. And did that consideration weigh with you in locating the proposed junction point?

"A. *We wanted a junction with the A&V, so we could use the A&V track and bridge, a portion of the track West of the river until we could enter Commerce Street.*"

(2) Mr. Neville, the president of the J&E Railway Company, testifies (R. p. 505):

"Q. And if I understand you, your desire to go to Curan's Crossing for a junction is predicated on the thought that if you get there you will be able to get a switch movement over the A&V?

"A. I know it.

"Q. From whom will you get this switch movement?

"A. From the authorities that control both

the A&V and the J&E, the Interstate Commerce Commission.

"Q. If you are unable to get the Interstate Commerce Commission to grant you a switching movement out of Curan's Crossing the main defense, from your point of view, between Curan's Crossing as a junction and the junction point suggested by the A&V will be eliminated?

"A. Absolutely, as a defense only.

"Q. What do you mean?

"A. I mean that any line, that under the present law policy governing *the consolidation and building of carriers*, to make the line a permanent success it must go into Jackson to make connections with other lines.

"Q. It must go into Jackson, how, on its own rails?

"A. No, sir.

"Q. How?

"A. Either go in on its own rails or the joint rails of other carriers.

"Q. What other carriers?

"A. The A&V."

(3) Mr. Neville further testifies (R. p. 470):

"Q. Now, going back to the proposition that you are testifying about, after the timber was removed, the railroad would have to be abandoned, why would you have to abandon the road?

"A. Simply because the road could not be utilized in the scheme of consolidation of the Interstate Commerce Commission and the Act of Congress at this time. It is not in line with the scheme of connection of railroads. If this junction was made at Pearson, I could not perfect any

arrangements with any road running North or South, couldn't join."

R. p. 501:

"Q. You stated yesterday that in order to live a short line road such as you had contemplated building would have to form a connecting link between other lines. What other lines have you in mind as a connecting line between them?

"A. The G&SI and the NOGN.

"Q. The NOGN has terminal facilities at Jackson?

"A. Yes, sir."

ALL OF THESE THREE QUESTIONS, NAMELY (1) The use of the main line track and terminal facilities of the A. & V. Ry. Co.; (2) The acceptableness *vel non* of the proposed J. & E. Ry. Co. to the Interstate Commerce Commission as a link in a system of consolidated connecting carriers; and (3) The forcing of the A. & V. by the Interstate Commerce Commission to handle through business into Jackson on a switching charge, **ARE MATTERS PECULIARLY AND ADMITTEDLY WITHIN THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION,** and if the proper place for the location of this junction is to be determined because of its bearing upon these three issues, it would appear not only logical, but essential, that the Interstate Commerce Commission should have and retain jurisdiction to locate the point of junction. The J. & E. is asking that this junction be placed at a point considered by eminent engineers and by all the trainmen who must pass over it to be improper and dangerous, because **IT SAYS** that it is the point which the Interstate Commerce Commission would consider most desirable in granting it the four

items of advantage listed. Its statement to that effect is unsupported and is contradicted but is its sole reason for demanding this improper junction. We point out that if the propriety of the point of junction is to be determined because of its bearing on the future action by the Interstate Commerce Commission, *then the junction point should be determined by that body.* It should not have its hand forced by what amounts to an *ex parte* proceeding before a justice of the peace.

The matter apparently appealed to President Neville, himself, in that way, as appears from his letter to President Jones of October 26, 1921, in which he says in part (R. p. 83):

> "In view of your position, there is nothing further for us to do **EXCEPT TO SUBMIT THE MATTER TO THE INTERSTATE COMMERCE COMMISSION FOR THEIR CONSIDERATION,** and, of course, we both will have to be guided by their conclusions."

And as appears from the fact that he actually filed a petition with the Interstate Commerce Commission, but on being informed that it was prematurely filed, because the two roads were not near enough to join, (the J. & E. not having then or yet built its line to the junction point), withdrew it. This withdrawal took place long after the injunction herein was sued out by the A. & V. Ry. Co. When the injunction was sued on the application of the J. & E. Ry. Co. was actually pending before the Interstate Commerce Commission.

THE LAW OF ISSUE NO. 1.

I.

THE INTERSTATE COMMERCE ACT AS AMENDED BY THE TRANSPORTATION ACT 1920, ESPECIALLY SECTION 3, PARAGRAPHS 3 AND 4, AND SECTION —, VEST IN THE INTERSTATE COMMERCE COMMISSION EXCLUSIVE JURISDICTION OF TRACK CONNECTIONS BETWEEN INTERSTATE CARRIERS. NO STATE TRIBUNAL CERTAINLY NO JUSTICE OF PEACE COURT MAY ORDER SUCH CONNECTIONS OR FIX THE RELATIVE RIGHTS OF INTERSTATE CARRIERS THEREAT.

That the Interstate Commerce Commission, and it only, has jurisdiction to order a junction between these carriers under these cicrumstances, affirmatively appears from the following statutory law and judicial decisions:

The Interstate Commerce Act, as amended by the Transportation Act 1920, *changed the prior law* by conferring the following additional authority upon the Interstate Commerce Commission. Section 3, Paragraphs 3 and 4, of the Act:

> "(3) All carriers engaged in the transportation of passengers or property subject to the provisions of this Act, shall according to their respective powers, *afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines* and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares and charges between such con-

necting lines or unduly prejudice any such connecting line in the distribution of traffic that is not specifically by the shipper.

"(4) If the Commission finds it to be to the public interest and to be practicable without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, *including main line track or tracks for a reasonable distance outside of such terminal* of any carrier by another carrier or carriers on such terms and for such compensation as carriers affected may agree upon, or in the event of a failure to agree, as the Commission may fix, as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

See also Sec. 5, relative to consolidations.

The Sections thus written into the Interstate Commerce Act by the Transportation Act of 1920 have recently been construed by the courts of last resort of the States of Ohio and New York, and in each instance, it has been held that since the adoption of the Transportation Act of 1920, the **Interstate Commerce Commission has exclusive jurisdiction of the subject matter of track connections** between carriers engaged in interstate and intrastate commerce. The decisions on the subject are as follows:

Supreme Court of Ohio, Dec. 4, 1923 *Lake Erie, A. & W. R. Co. vs. Public Utilities Commission*, 141 N. E. 847:

(Syllabus):

"Where a railroad engaged in interstate and intrastate commerce invokes the jurisdiction of the Interstate Commerce Commission for an order requiring another railroad likewise engaged in interstate and intrastate commerce to join in making a physical connection between the two lines, pursuant to Paragraph 3, Section 3, of the Interstate Commerce Act, as amended by the Transportation Act of February, 1920, (U. S. Comp. St. Supp. 1923 §8565 [3]), and before final determination thereof such applicant road, without dismissing such proceeding before the Interstate Commerce Commission, makes application to the Public Utilities Commission of Ohio for exactly the same connection, and secures the same in so far as intrastate commerce is concerned, and thereafter the Interstate Commerce Commission, whose jurisdiction was first invoked, having fully heard the original application, denies the same upon grounds affecting both interstate and intrastate commerce, held under such circumstances the jurisdiction of the Interstate Commerce Commission is exclusive and the Public Utilities Commission of Ohio was without jurisdiction to grant such order."

(P. 849):

"The Court of Appeals of New York has recognized the exclusive character of this jurisdiction in the cases of *People of State of New York ex rel. New York Central Rd. Co. vs. Public Service Commission*, 233, N. Y. 113 135 N. E. 195, 22 A. L. R. 1073, *in which it was held that the Public Service Commission of that State had no authority to make an order directing two railroad companies engaged in interstate and intrastate commerce, whose lines ran through the City of Bata-*

via, to install a connecting line; that both of the railroads in question being engaged in interstate and intrastate commerce, *the relief sought could be granted only by the Federal Interstate Commerce Commission,* in compliance with the Interstate Commerce Act, Section 3, Paragraph 3, as amended by the Transportation Act of 1920.

"It is contended that the contrary view has been held by the Supreme Court of Wisconsin in *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. vs. Railroad Commission of Wisconsin,* 178 Wis. 293, 189 N. W. 150.

"Referring to the decision of the Court of Appeals in this last named case, the Supreme Court of Wisconsin, at page 279 of 178 Wis., at page 152 of 189 N. W., uses this language:

> " 'The Court of Appeals reversed the order of the Public Service Commission requiring a connection, on two grounds: First * * * and Second: *Because Congress by the passage of the Transportation Act of 1920 * * * so amended the second paragraph of Section 3 of the Interstate Commerce Ast as to give the Interstate Commerce Commission jurisdiction of connecting tracks, and by so doing took away the right of a State Commission to act upon the subject.* The latter reason, even if conceded to be a valid one where it applies and **upon that subject we express no opinion,** does not affect this case because the proceedings were begun and the order made before the passage of the Federal Act.'

"But conceding that the Wisconsin case denies the exclusive character of the jurisdiction conferred by Paragraph 3, Section 3, of the Interstate Commerce Act, yet it, and also the New York, California and South Carolina cases, are to

be distinguished from the case at bar, for the reason that in none of them had the affirmative jurisdiction of the Interstate Commerce Commission been first invoked by the applicant.

"We are confronted with the situation, where a jurisdiction voluntarily invoked having been exercised, its effect cannot be denied."

* * * * * *

"It is self-evident that this connection once made is equally available for interstate as well as intrastate commerce. The same connection is asked for before the Interstate Commerce Commission, and though granted by the Ohio Public Utilities Commission, in so far as intrastate traffic is concerned, its use for interstate commerce is at once available so far as the physical connection is concerned."

Court of Appeals of New York, March 7, 1922, *People ex rel. New York C. R. R. Co. vs. Public Service Commission*, 233 N. Y. 113, 135 N. E. 195, 22 A. L. R. 1073:

(Syllabus 1):

"State authorities *cannot compel interstate carriers to make physical connections between their tracks for interchange of traffic*, notwithstanding the Federal Transportation Act provides that the authority of the Interstate Commerce Commission shall not extend to the construction of spur, industrial, team, switching, or side tracks located wholly within a State."

(P. 1076):

"We are also of opinion that the relator and the Lehigh Valley Company being engaged in interstate and intrastate commerce, the relief sought in this proceeding **CAN BE GRANTED ONLY BY THE INTERSTATE COMMERCE COMMISSION.**

"The Transportation Act of 1920 (41 Stat. at L. 479, Chap. 91, Fed. Stat. Anno. Supp. 1920, p. 120), §405, amended the second paragraph of §3 of the Interstate Commerce Act to provide: 'All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, an for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their lines, fares and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.'

"A violation of that provision of the Act of Congress authorizes a complaint by any interested party to the Interstate Commerce Commission, and, after a hearing before that Commission, to such relief as the facts warrant. **THE INTERSTATE COMMERCE COMMISSION IS CLOTHED WITH AUTHORITY BY THE SECTION QUOTED TO COMPEL CARRIERS TO AFFORD REASONABLE AND PROPER FACILITIES FOR THE INTERCHANGE OF TRAFFIC BETWEEN THEIR RESPECTIVE LINES.** The order made by the Public Service Commission commands relator and the Lehigh Valley to make such trac connections between their roads as shall be necessary to establish and furnish adequate and convenient interchange of freight between said roads. To sustain the order of the Public Service Commission in the instant case would necessarily establish that the two several commissions mentioned were clothed with jurisdiction to grant the relief sought, and require us to ignore the well-established principle of

law that, the Congress having delegated to the Interstate Commerce Commission power to deal with the subject matter of this proceeding, and exercise of like power by the State is thereby superseded. *Erie R. Co. vs. New York*, 233 U. S. 671, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, 34 Supt. St. Rep. 756, Ann. Cas. 1915D, 138; *Chicago R. I. & P. Co. vs. Harwick Farmers' Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203, 33 Sup. Ct. Rep. 174.

"Counsel for the Public Service Commission calls attention to subdivision 22 of §1 of the Interstate Commerce Act as amended by §402, Transportation Act 1920, which reads as follows: 'The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team switching or side tracks, located or to be located wholly within one State, or of street, suburban, orinterurban electric railway, which are not operated as a part or parts of a general steam railroad system of transportation.'

"Paragraphs (18) to (21) referred to, prohibit a carrier from extending its line of road or the construction of a new line or road, or the operation of any extension, save when permitted so to do in the manner provided for in the paragraphs enumerated. Counsel for the Commission argued that, the line or piece of road ordered to be constructed being wholly within the State, the Public Service Commission was empowered to make the order under review. We do not coincide with the argument of counsel. The track ordered to be constructed was not a spur, industrial, team, switching or side track, but rather, as stated in the order of the Commission, was a

track connection between the two roads of relator and the Lehigh Valley, and said two roads were also commanded to lay and install such other tracks as may be necessary to furnish adequate and convenient interchange of freight between said railroads.

"The order of the Appellate Division should be reversed, and the determination of the Public Service Commission annulled, with costs in this Court and the Appellate Division.

"Hissock, Ch. J., and Cardosa, McLaughlan, and Andrews, J. J., concur.

"Crane, J., concurs on first ground stated in opinion.

"Pound, J., not voting."

We respectfully submit that this reasoning is sound and that under the paragraphs quoted from the Transportation Act of 1920, Congress has taken possession of the field of track connections and has vested the exclusive power to regulate and control such connections in the Interstate Commerce Commission. This being so, the power of the State either through a railroad commission or through a condemnation court, or otherwise, to give or regulate track connections is at an end.

There can be no division of the field: The power of Congress is paramount and exclusive.

233 U. S. 671, *Erie R. R. Co. vs. N. Y.* (58 L. Ed. 1149:

> "After Congress acts on a matter within its exclusive jurisdiction theer is no division of the field of regulation."

New York Central R. R. Co. vs. Winfield, 244 U. S. 147, "Federal Employers' Liability Act":

> "It is settled that under the commerce clause

of the Constitution, Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it is also settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority."

Southern Ry. Co. vs. R. R. Comm., Indiana, 236 U. S. 439, "Safety Appliance Act":

"But Congress could pass the Safety Appliance Act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that when exercised it is exclusive, and *ipso facto,* supersedes existing state legislation on the same subject. Congress of course could have 'circumscribed its regulations' so as to occupy a limited field. *Savage vs. Jones,* 255 U. S. 501, 533; *Atlantic Line vs. Georgia,* 234 U. S. 280, 293. But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The state, therefore, could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties. For, as said in *Prigg vs. Commonwealth of Pennsylvania,* 16 Pet. 539, 617: 'If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislation have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional

regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it * * * the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed."

Charleston & Car. R. R. vs. Varnville Furniture Co., 237 U. S. 597:

"When Congress has taken the particular subject matter in hand, coincidence of a state statute is as effective as opposition, and a state law on the same subject cannot be sustained as a help to the Federal statute because it goes further than Congress has seen fit to go."

Adams Express Co. vs. Croniger, 226 U. S. 491, 505, "Carmack Amendment":

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased

to exist. *Northern Pacific Ry. vs. State of Washington*, 222 U. S. 370; *Southern Railway vs. Reid*, 222 U. S. 424; *Mondou vs. Railroad*, 223 U. S. 1."

Chicago & R. I., Etc., R. vs. Hardwick Elevator Co., 226 U. S. 426, 435:

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power. *Southern Ry. Co. vs. Reid*, 222 U. S. 424."

Illinois Central R. R. vs. La. R. R. Comm., 236 U. S. 157:

"The switching of empty cars to and from a connection with an interstate railroad to a side track within the terminal of another railroad, for

> the purpose of being there loaded with goods intended for interstate commerce, constitutes a part of interstate commerce, the regulations of which Congress has undertaken, and any order of a state commission regulating such switching transcends the limits of its power."

There is no need to multiply authorities on that point.

If we are right in this, then plainly the Mississippi Railroad Commission would be without authority to make such a connection and *a fortiori*, the Mississippi *condemnation court*, a tribunal presided over by a Justice of Peace, in which nothing may be contested save the amount of damages to be awarded would be without power to locate such a junction. If the Interstate Commerce Commission has the exclusive jurisdiction of subject-matter, then plainly the State of Mississippi and the various subdivisions and instrumentalities of that State are without that power, since they have no power, save such as is vested in them by the State, and if the State is devoid of power, certainly they are without it. Power, like water, can rise no higher than its source. If this position be correct, the fallacy of the contention of the Jackson & Eastern Railway Company is revealed. That company boldly asserts and arrogates **TO ITSELF THE EXCLUSIVE RIGHT** to determine where this junction shall be. It asserts the rights to locate the junction **WHERE IT AND IT ONLY DESIRES IT** and where the Alabama & Vicksburg Railway Company and the State Highway Authorities, represented by the Highway Commissioner, who took the stand and swore that the proposed junction would constitute a serious flood

menace to the State Highway (R. pp. 173 to 176), do not desire it and have compelling reason for not wanting it, and it proposes to carry out its own arbitrary wishes in the matter by invoking the aid of the state's condemnation court.

If this be lawful, then what becomes of the Commerce Clause of the Constitution, the Interstate Commerce Act and Transportation Act of 1920? It needs no lively imagination and no gift of prophecy to discover that if a State J. P. Court cant saddle upon an interstate railroad such junction points as it desires, that State J. P. Court can not only regulate, but can destroy the interstate railroad. There can be no half measures, no midway point, no twilight zone, **no concurring jurisdiction.** As the New York Court points out, either the State tribunal or the Federal tribunal must have exclusive jurisdiction, else we would be faced at once with the situation where the Federal tribunal would prohibit the junction, while the State tribunal would order it installed, or vice versa. This being so, it cannot be doubted that the proper authority to have exclusive jurisdiction and to give consideration to the rights of the various parties and the public and to actually order the junction is **NOT A STATE INSTRUMENTALITY** at all, but the Interstate Commerce Commission, which in turn is obligated, when it passes upon the question, to protect and reserve to the Alabama & Vicksburg Railway Company the rights guaranteed to it by the Constitution of the United States.

ISSUE NO. II.

WHEN A STATE CONDEMNATION STATUTE PREVENTS A DEFENDANT IN CONDEMNATION FROM RAISING IN THE CONDEMNATION SUIT ANY ISSUE WHATSOEVER, SAVE AS TO THE AMOUNT TO BE PAID, THE CONDEMNATION DEFENDANT IS DENIED THE EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT, IF THE PETITION FOR CONDEMNATION FAILS TO DECLARE CLEARLY THE PRECISE PROPERTY AND THE PRECISE INTEREST THEREIN SOUGHT TO BE CONDEMNED, SINCE IN THE ABSENCE OF SUCH FREEDOM FROM AMBIGUITY, THE DEFENDANT CANNOT PROPERLY PREPARE AND PRESENT ITS LIMITED DEFENSE.

Under the law of the State of Mississippi, as construed by the Supreme Court of that State, both previously (see *Vinegar Bend case*, 43 Sou. 292) and in this very case (see 95 Southern 733, R. p. 28) the defendant in such a condemnation suit as was instituted by respondent for hearing before the Justice of the Peace R. p. 607, *et seq.*, is prohibited from raising any question or making any defense save the question of the amount to be paid to it for compensation for the property taken or damaged. The defendant could not in that condemnation proceeding object to the fact that the Jackson & Eastern Railway Company was seeking to condemn its main line track and destroy the continuity of its railroad, nor could it deny its right to do so. It could not object that the proposed junction was an improper one. It could not object to the sufficiency of the description of the property to be taken, although the Mississippi judges have been unable to agree as to what was sought to be taken. It could raise only one

question, that is the question as to the amount to be paid it when the plaintiff in condemnation takes its judgment and goes into possession of the property sought to be condemned.

The language used by the Supreme Court of the State of Mississippi in the case at bar in laying down this doctrine, is as follows (95 Sou. 733, R. p. 35):

> "Under the facts alleged in the bill as above set out we think the complainant has a right to resort to a court of equity to have this question determined, as it could not raise the question in the Eminent Domain proceedings as has been decided by this Court in the case of *Vinegar Bend Lumber Co. vs. Oak Grove & G. R. Co.*, 89 Miss. 84, 43 Sou. 292. In other words, in this case the Court construed the statute of eminent domain and adjudicated that **the only question that could be decided in that proceeding was the amount of damages.** That the Court could not decide the right of the plaintiff in such proceedings to institute the proceedings, **nor could any other question be raised than that of the amount of damages**, and that the Circuit Court on appeal from the judgment of the Eminent Domain Court had no greater right of jurisdiction than the Eminent Domain Court had.
>
> (Black letters by present writer.)

Because it was thus deprived of an opportunity to defend itself in the condemnation court, the A&V Ry. Co. went into the Chancery Court of Lauderdale County, Miss., and sued out an injunction restraining the further prosecution by the Jackson & Eastern Railway Company of the condemnation proceedings. This bill

was dismissed by the Chancellor on demurrer and *supersedeas* was by him denied to complainant, but on application to the Supreme Court of Mississippi, that tribunal first allowed a *supersedeas* and later reinstated the Bill and remanded the case. See 91 Sou. 902, 95 Sou. 733, R. p. 28.

The case was then tried on its merits in the lower court, whereupon the Chancellor handed down a decree reading in part (R. p. 69):

> "It is the opinion of the Court that the eminent domain proceedings instituted by the defendant against the complainant seek to condemn greater right in the property of the A&V Railway Company than a mere easement for the purpose of making its junction and it is the opinion of the Court that the J&E Railway Company, defendant herein, is not entitled to acquire a dominant right of ownership in the property of complainant under the law and **the application should be amended to that extent."**

Notwithstanding this finding, he dismissed the bill, thereby leaving the plaintiff in condemnation free to secure a judgment for an interest in the A&V Railway Company's property greater than the Chancellor considered that the law permitted and leaving the defendant in condemnation defenseless since the Supreme Court of Mississippi had already held in its decision in this very case R. p. 28, that it could set up only one defense, namely, the question of the amount to be paid it for the property taken.

The case then went to the Supreme Court of Mississippi for a third time and was argued before a section

consisting of three Judges of that Court. They being unable to agree, referred the case to the Court *en banc*. That Court then handed down a decision by a divided court, affirming the decision of the Chancellor, 101 Sou. 553, R. p. 677, which, as stated, left the plaintiff in condemnation free to obtain a judgment for an interest in the A&V Railway Company's property greater than the Chancellor considered legal and left the A&V Railway Company powerless while this outrage was proceeding. This decision of the Supreme Court of Mississippi together with its previous decision, 95 Sou. 733, R. p. 28, which it held to constitute in part the law of the case, are here sought to be reviewed by the Alabama & Vicksburg Railway Company. That review has been sought both by certiorari and by writ of error.

The ground upon which plaintiffs-petitioners seek relief is predicated on the above facts and is thus stated by Mr. Justice Anderson of the Supreme Court of Mississippi in his dissenting opinion in this case, 101 Sou. 556 (R. p. 683):

> "The bill of the Alabama & Vicksburg Railway Company ought to have been sustained, in my judgment, on another ground, and that is that the eminent domain application of the Jackson & Eastern Railway Company **failed to sufficiently describe the right or easement it sought to condemn.** It is unquestioned that the Jackson & Eastern Railway Company has no right under the statute to condemn the fee in the tracks and right-of-way of the Alabama & Vicksburg Railway Company for the junction. Where a lesser interest than the fee in land is sought to be appropriated in a condemnation proceeding, the lesser interest

> must be defined with such certainty as to apprise the owner of the nature and extent of the interest which is to be taken, and also with such certainty as to enable the jury to intelligently and according to law assess the compensation to be paid for the interest taken. *Pontiac Improvement Company vs. Board of Commissioners*, 104 Ohio State 447, 135 N. E. 635, 23 A. L. R. 866. Certainly the proceedings ought to be definite enough as to description of the right sought to be taken as that the owner of the fee will know how much he will have left after the proposed easement is taken. This is also necessary to enable the taxing authorities to properly assess the property. Unless what is taken by the condemnation proceedings is made definite how could the taxing authorities determine what assessment value to put on what was taken and what was left?"

Plaintiffs, petitioners, contend that (1) in view of the language quoted from the Supreme Court of Mississippi wherein that tribunal expressly stated that petitioners can raise in the condemnation suit no question save the question of the amount of money to be paid to it (R. P. 35):

(2) In view of the language quoted of the Chancellor who heard the case

(3) In view of the language quoted *supra*, from the dissenting opinion of Justice Anderson (R. p. 683), who held that the condemnation petition does not sufficiently describe the property sought to be acquired, (4) in view of the language of the condemnation proceeding quoted *supra* (R. p. 607), which describes in D-3, R. p. 607, a piece of land covering the A. & V. Ry. Co.'s main line of track, and says, R. p. 610:

> "• • • and your applicant further shows that it is necessary for it to **OWN, OCCUPY AND USE said strip of land, rights, privileges and easements, above described,** in order properly to conduct its business as a common carrier, for which purpose it was organized."

And which concludes with a prayer reading (R. p. 610):

> "WHEREFORE, your applicant prays that such steps be taken for the condemnation of said LANDS, rights, privileges and easements, for the purposes aforesaid, as are required by Chapter 43, and Section 4096 of the Annotated Code of 1906 of Mississippi.
>
> "And as in duty bound, your applicant will ever pray."

it is apparent that unless the Supreme Court of Mississippi is reversed and the condemnation proceeding is enjoined, plaintiffs-petitioners will be deprived of their property without due process of law and denied the equal protection of the laws in contravention of the Constitution of the United States, particularly the Fourteenth Amendment. This is so, for the reason that unless that Court is reversed and petitioner's injunction is maintained, petitioners will be compelled to go before a jury of farmers with their hands tied so as to prevent their making any defense save on the question of amount of compensation (R. p. 35) and will have taken from them valuable property. **JUST WHAT PROPERTY WILL BE TAKEN IS THE SUBJECT OF A DIFFERENCE OF OPINION AMONG THE MISSISSIPPI JUDGES THEMSELVES. THIS**

BEING SO, CERTAINLY THE JURY WILL NOT AND CANNOT KNOW JUST WHAT PROPERTY IS BEING TAKEN; and plaintiffs-petitioners, unless this fact is ascertained and made certain in advance, cannot make proper proof of their damages and cannot receive due process of law and the equal protection of the laws, as required by the Constitution of the United States.

See *Pontiac Improvement Company vs. Board of Commissioners*, 135 N. E. 635 (23 A. L. R. 866); Ohio 1922:

> "'Where a lesser interest than a fee in real estate is sought to be appropriated in a condemnation proceeding by a municipality or board for public use, the lesser interest must be defined with such certainty as to apprise the owner of the nature and extent of the interest which is to be taken and also with such certainty as will enable a jury in accordance with the Constitution to intelligently assess the compensation to be paid for the interest taken.' For lack of such certainty the Ohio Court enjoined this condemnation proceeding."

20 C. J. Par. 6:

> "DESCRIPTION OF PROPERTY, AND LOCATION AND NATURE OF IMPROVEMENT—(a) In General. The petition in condemnation proceedings must describe the property sought to be taken, defining the location and quantity required with such certainty that it may be identified, and the extent of the petitioner's claim made known to the owner, and a failure of the petition, complaint or application to thus describe the property, or any uncertainty in this respect, will vitiate the proceedings, unless an amendment of the description is allowed."

ISSUE No. III.

NO TRIBUNAL CAN TRANSFER AN ESSENTIAL SECTION OF THE MAIN LINE TRACK OF ONE CARRIER TO ANOTHER CARRIER FOR A LIKE PURPOSE WITHOUT VIOLATION OF THE FOURTEENTH AMENDMENT AND THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION.

Plaintiffs-petitioners point out that Sections 1867 and 1868 of the Mississippi Code of 1906, being a part of Chapter 43 of the Code of 1906, the law under which the J. & E. Ry. Co. is expressly proceeding in the condemnation proceedings, and which is expressly referred to in the prayer of the condemnation suit (R. p. 610), read as follows:

> "1867 (1692) JUDGMENT. Upon the return of the verdict, the Court shall enter a judgment as follows, viz.:
>
> "'In this case the claim of (naming him or them) to have condemned certain lands named in the application, to-wit: (here describe the property), being the property of (here name the owner), was submitted to a jury composed of (here insert their names) on the.....day of....., A. D....., and the jury returned a verdict fixing said defendant's due compensation and damages at.....dollars, and the verdict was received and entered. **Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.** Let the applicant pay the costs for which execution may issue. "J. P."'
>
> "1868 (1693) RIGHTS OF APPLICANT AFTER THE JUDGMENT. Upon the return of the verdict and entry of the judgment, if the applicant pay the defendant whose compensation is

> **fixed by it, or tender to him the amount so found and pay the costs, he or it shall have the right to enter in and upon and take possession of the property of such defendant so condemned, and to appropriate the same to the public use defined in the application; and in case the defendant and his attorney absent themselves from the court, the payment may be made to the Clerk of the Circuit Court for him, and such officer shall be responsible on his bond therefor and shall be compelled to receive it."**

That as the A. & V. Ry. Co. will be precluded from raising any issue in these proceedings save the question of the amount of the award (R. p. 35), there will necessarily be inserted in the form of judgment prescribed by Article 1867 of Chapter 43 of the Mississippi Code, the description of the property sought to be condemned, as described *supra* this brief, p. 9, and in the map on page 9 of the petition for certiorari (R. p. 607) and under Articles 1867 and 1868, the J. & E. Ry. Co. upon payment of the amount of the award will be privileged "to enter upon and take possession of said property and appropriate it to public use, as prayed for in the application."

Now the Jackson & Eastern Railway Company has alleged (R. p. 610):

> "And your applicant further shows that it is necessary for it to **OWN, OCCUPY AND USE THE SAID STRIP OF LAND,** rights, privileges and easements above described in order properly to conduct its business as a common carrier, for which purpose it was organized."

The said J. & E. Ry. Co. will, therefore, unless re-

strained, pay the amount of the award and will then proceed "to own occupy and use the said strip of land", which strip of land consists of a section of **the main line of track, embankment and rails of your petitioners.** See map, p. 9, of Petition for Certiorari.

There is no provision in the Mississippi Statutes for a joint use by the applicant and the owner whose land is condemned. The applicant is entitled by the very terms of the statute and of the judgment to enter upon and take possession of the property condemned, meaning the exclusive possession.

This means then that the main line of one interstate railroad is being taken from it for a like purpose by another, a newer and a much smaller railroad. This cannot be done. As a result of the action of the Supreme Court of Mississippi in dissolving its aforesaid injunction and permitting this to be done, the A&V Ry. Co. is being deprived of its property without due process of law and denied the eual protection of the Constitution of the United States, which is expressly pleaded and relied on by it in its original petition for injunction, and the State of Mississippi is interfering with and burdening interstate commerce in violation of the Commerce Clause of the Constitution. The provisions of the Constitution and Laws of the State of Mississippi which are held by the Supreme Court of Mississippi to justify such procedure are illegal and void as in contravention of the Commerce Clause and the Contract, of the Federal Constitution.

Counsel for the J. & E. Ry. in their brief in opposition to the application for certiorari say:

"The Supreme Court of Mississippi in its opinion on the second appeal found on page 555, 101 SO., in referring to the contention of the Alabama & Vicksburg Railway Company in its application for condemnation was seeking to acquire a portion of the main line of the Alabama & Vicksburg Railway Company, said:

> "Another question presented now which was also in the former appeal, though not discussed in that opinion, is that the injunction should have been sustained, because the application for the condemnation of the right-of-way of the appellant sought to condemn the ownership or fee in the strip of land of appellant's main line for the proposed connection purposes, whereas the law permits only the condemnation of an easement for a connection. We have examined and construed the language used in the application for condemnation, and **while the words, 'Own, occupy and use', said strip of land, rights, privileges and easements above described, would seem to indicate that it was an attempt to condemn the ownership in the strip of land** to be used for connecting purposes, instead of the condemnation of an easement thereof, yet we think that, taking the application as a whole, the language should be construed to mean that only an easement is sought to be condemned. Under the law an easement is all that could be secured by the condemnation proceedings, and we think that was all that was intended to be condemned, and the judgment of condemnation must necessarily be limited to the acquirement only of an easement for the proposed connection. Therefore, we hold that the application when properly construed, seeks only an easement which the appellee, Jackson & Eastern Railway Company, is entitled to under the law."

This Court is bound by the construction of the laws of Mississippi and the legal effects of judgments rendered by the state courts, as given by the Supreme Court of the state. *Thornton vs. Duffy*, 254 Ws. 361; 65 Law Edition 304."

But this seems to us entirely beside the point for two reasons:

FIRST, our contention which was clearly stated by Judge Anderson is, that the A. & V. Ry. Co. has a constitutional right to have the petition for condemnation make clear what is to be taken from it for the reasons given in the *Pontiac* case, namely, (1) so that it may be apprised of the nature and extent of the interest to be taken, and (2) so to enable a jury in accordance with the Constitution intelligently to assess the compensation to be paid for the interest taken. Unless this is done the condemnation petition is not due process of law, but is a travesty and a farce. That no unambiguous description of what was to be taken was included in the condemnation petition, R. p. 607, is at once and abundantly apparent from the reading of that petition and is emphasized by the fact that the chancellor who heard the case held:

> "It is the opinion of the Court that the eminent domain proceedings instituted by the defendant against the complainant seek to condemn a greater right in the A. & V. Railway Co. than a mere easement for the purpose of making its junction." * * *

Justice Anderson held:

> "The bill of the Alabama & Vicksburg Railway Company ought to have been sustained in my

judgment on another ground, and that is that the eminent domain application of the J. & E. Ry. Co. failed to sufficiently describe the right or easement it sought to condemn."

And the majority of the Court itself held:

> "We have examined and construed the language used in the application for condemnation, and while the words 'own, occupy and use' said strip of land, rights, privileges and easements above described **WOULD SEEM TO INDICATE THAT IT WAS AN ATTEMPT TO CONDEMN THE OWNERSHIP IN THE STRIP OF LAND TO BE USED FOR CONNECTING PURPOSES,** instead of the condemnation of an easement thereof, yet we think that, taking the application as a whole, the language should be construed to mean that only an easement is sought to be condemned."

Showing plainly that in their opinion the language was not free from ambiguity.

SECOND, we point out that the question as to what that language means, that is to say, the question of what the J. & E. Ry. Co. is asking for and what it will take unless restrained is not a question of Mississippi law at all, but **is a question of fact.** The Mississippi law is that it gets a judgment for whatever it asks. It may be that what the J. & E. is asking for and will take judgment for is more than the Mississippi law allows them, but that circumstance will not help the A. & V. Ry. Co. if the Mississippi courts allow the J. & E. to take that judgment. It may even be that the Mississippi Courts would set that judgment aside, but that is not entirely certain and is no reason for permitting it to be entered.

There is nothing in the Constitution of the United States allowing a state to take away the property of a citizen on a promise to restore it by judgment to be thereafter rendered. Upon the question of fact as to what the J. & E. is asking for and will take judgment for if permitted, this Court is entirely at liberty to make its own finding, regardless of the Mississippi Court. On that question of fact we respectfully submit that when the J. & E. Ry. Co. on R. p. 607 said:

> "That the following **real property**, rights, privileges and easements are sought to be condemned for the purposes hereinafter stated, to-wit: A strip of land of varying widths, etc."

When it said, p. 610, Sec. 4:

> "Applicant further shows that it is necessary for it **to own, occupy and use said strip of land**, rights, privileges and easements above described in order properly to conduct its business as a common carrier, for which purpose it was organized."

When it concluded that petition with a prayer reading:

> "Wherefore your applicant prays, that such steps be taken for the condemnation of **SAID LANDS**, etc."

which admittedly are a section of the A. & V. Railway Company's main line track, it made it plain that it was asking for more than an easement. In resolving this question this Court will bear in mind that the Supreme Court of Mississippi has expressly said that the A. & V. Ry. Co. could not in the condemnation proceedings

raise "any other question than the amount off damages" (R. p. 35), and the Mississippi Statutes beimg Articles 1867 and 1868 of the Code quoted *supra* expressly provide that the judgment of that Court shiall read in part:

> "Now upon payment of the awardl applicant can enter upon and take possession of the said property and appropriate it to publlic use as prayed for in the application."

The application describes **A STRIP OF LAND**; it says that it is necessary for the applicant "to own, occupy and use said strip of land", and the prayer is "for the condemnation of said lands". All this was bound to go into the judgment since the statute says "take possession of the said property and appropriated it for public use as prayed for in the application" with no right vouchsafed the A. & V. save to fight over the amount to be paid to it for the land. That judgment was to be recorded and the J. & E. was then entitled to "enter upon and take possession of the property".

Unless the English language has lost its meaning, we have a case wherein a standard trunk line railroad has only this Court as a shield against a condition under which it will have a section of its main line track torn away from its "ownership, use and occupation", under which it will become two disconnected railroads instead of one continuous line. This being so, that trunk line railroad is entitled to invoke through this Court the protection of the contract clause and the Fourteenth Amendment of the Federal Constituion.

LAW AS TO ISSUE NO. III.

To Permit a Small Unimportant Railroad to Condemn the Right to "Own, Occupy and Use" for its Purposes a Section of the Main Line Track of one of the Important Railroad Arteries of the State, which Section of Track has been Owned and Used as the Main Line for Many Years by the Larger Railroad Under Its Charter from the State and which Section of Main Line Track is Essential to the Maintenance of the Continuity of Its Trunk Line, Is to Deprive the Larger Railroad of Its Property Without Due Process of Law to Deny It the Equal Protection of the Law to Devest Its Vested Right and to Impair the Obligation of Its Contract with the State, the Whole in Violation of the 14th Amendment and the Commerce and Contract Clauses of the Federal Constitution.

To summarize: It appears from the condemnation petition (R. p. 607), that the J&E Ry. Co. is seeking "to own, occupy and use" the main line track of the A&V Ry. Co. It appears from the record that the A&V Ry. Co. is a railroad corporation chartered under the laws of the State of Mississippi, which has owned, occupied and used this section of its main track for many, many years. It appears that the line of the A&V Ry. Co. is a practically straight, single line of track without branches extending from Meridian, Mississippi, to Vicksburg, Mississippi, (R. p. 148) and it appears that the section of track sought to be condemned by the J&E Ry. Co. is about midway between Meridian and Vicksburg, and that if this section is condemned, the continuity of the line of the A&V Ry. Co. will be broken and its railroad

divided into two disconnected pieces of track. We have seen by the admission of President Neville of the Jackson & Eastern himself (R. p. 506), that the traffic of the two railroads may not even be compared, the A&V Ry. Co. being a trunk line and one of the important through interstate rail and mail routes of the southwest (R. p. 92), while the Jackson & Eastern is a not yet complete experimental route and is *an enterprise of so doubtful a nature that the Interstate Commerce Commission has been unwilling to permit it to sell its bonds to the public*, the Interstate Commerce Commission's finding on this subject being dated July, 1921, and being as follows:

(R. p. 541):

> **"THE RECORD AS A WHOLE FAILS TO AFFORD REASONABLE ASSURANCE THAT THE PROJECT WILL BECOME A PERMANENTLY SUCCESSFUL ENTERPRISE.** However, since local interests are ready and willing to assume the burden with a full knowledge of what the future will hold for the enterprise, it seems proper that they should be permitted to do so, *but in view of the uncertain future of the road, we do not think it would be proper for us to sanction at this time the issuance of bonds to finance its construction.*"

We have quoted President Neville's own statement on oath in this case that the purpose of the J&E in seeking to condemn the A&V main line was to save itself expense. (R. p. 206.)

That under these circumstances, the J&E Railway Company could not acquire through any state instrumentality the right to *own, occupy and use* a section of the

main line of the A&V Ry. Co., without infringement of the rights, privileges and immunities guaranteed to the A&V Ry. Co. by the Constitution of the United States, particularly the contract clause and the XIV amendment, is conclusively demonstrated by the following authorities and by the reasoning upon which these authorities rest.

20 C. J., page 606, §92:

> "A limitation on the power of a railroad company to appropriate the property of another railroad is that **it cannot take the property of another company to apply it to the same use.** If the taking would result merely in a change of ownership without affecting the use of the property, it becomes a matter of mere private concern without at all affecting the public interest. Nor can one railroad company take a fragment of a competing road constituting the most valuable part of it where this will destroy the usefulness and value of the remaining fargment."

Elliott on Railroads, 3rd Edition, §1130:

> "So, it is said that, 'while a public service corporation like a railroad company is bound to render to the public certain services appropriate to its particular functions, it is not bound to permit its property to be subjected to use by a rival corporation, unless by express statutory enactment and by due process of law thereunder. And, where the appropriation of the franchise of a street railroad company by a railroad company *was made merely as a matter of economy, and to avoid the purchase of valuable property which the railroad company must have acquired to reach its terminus without interference with the street railroad, it was held that no such necessity existed.*

Eliott on Railroads, 3rd Edition, §1225:

"Taking right of way of another road: When not allowed. Where the statute confers only a general authority to condemn property for railroad purposes land appropriated by a railroad company for public use can not afterwards be appropriated by another company for a similar use where the two cannot coexist, *except in case of a necessity so absolute that without such appropriation the grant to the latter company will be defeated*, a necessity arising from the very nature of things, over which the company has no control, *not one created by the company itself for the sake of convenience or economy*. As a general rule, under such authority, a corporation will not be permitted to condemn property already devoted to such use. This rule seems particularly applicable where one company is seeking to condemn and take the right of way of another company longitudinally. **THUS, IT HAS BEEN HELD THAT ONE RAILROAD COMPANY CANNOT APPROPRIATE A PORTION OF THE RIGHT OF WAY OF ANOTHER RAILROAD COMPANY FOR THE PURPOSE OF BUILDING A PARALLEL ROAD.** Nor will one railroad company be permitted for any purpose to take such a part of the line of another road as to practically destroy such road. And courts should give due consideration to the question of the future needs of a railroad in fulfilling its chartered purpose and performing its public duty as a common carrier before they undertake to deprive a railroad company of any part of its right of way at the instance of another corporation. Where a petition by a railroad company for the appointment of commissioners to condemn the 'located route' of an existing railroad shows that it seeks to condemn a

part of the route generally, and not merely for the purpose of crossing, an order made thereon will be set aside. And where a railroad corporation is seeking to condemn a longitudinal section of the right of way of another company for its exclusive use, it may be restrained by injunction unless express authority to make such condemnation has been conferred."

163 Fed. 724 *Elkins Ry. Co. vs. Western Md. R. Co.*, (p. 732):

"It must be conceded that, where one railroad company has secured under its charter rights the right of way and built thereon its line of road and is using the same for public uses, *the Legislature could not authorize the taking wholly thereof by another railroad corporation for like public use.* The extent of its power would be to authorize the second company to place upon the land an additional burden or easement on or over it to be constructed so as 'not to impede transportation of persons or property along the same' by the first corporation owning the fee title to the land. These fundamental principles were well set forth and settled by Tucker, J., in the *Tuckahoe Canal Company vs. Tuckahos & James River Railroad Co.*, 11 Leigh (Va.) 42, 36 Am. Dec. 374. Where railroads cross each other for the mutual benefit of both, and do 'not impede the transportation of persons and property along the' route of the first one owning and operating the right of way, the Legislature may well direct as it has in clause 7, §2343 (Chapter 54, §50), that the railroad intersected 'shall unite with the corporation owning such new railroad in forming such intersection', but this section cannot be construed as, first, authorizing the new company *to take wholly the property of the old to the destruction of its right to use and operate*

its road; nor, second, to take such right of easement and joint use without paying just compensation. Such a construction of this statute would be *to allow confiscation and destruction of vested rights in the older company which are always to be first considered.*"

(P. 734, 735):

"If necessary, I would hold that, if such condemnation were attempted, the equity court would have full power to enjoin and stay the prosecution of any such proceeding at law **until it had by its decree, fixed the location and character of the crossing to be condemned.** I have deemed this discussion necessary in order to determine the contention of the electric company that it is entitled to have the crossing of its choice as a matter of right. * * *

"If then, this court must determine, as such seems to be the requirement of the law, the location of a crossing over defendant's tracks for this electric road, I feel constrained to say from the report of the engineers and the evidence in the case that such crossing should not be fixed or allowed at the point asked for by the electric company. Without discussing the evidence, it clearly shows that such crossing would be very dangerous to the railroad and to the public; that it would be very expensive to both roads, would very greatly impede the railroad company's necessary operations, and can be avoided. So far as crossing at First Street is concerned, I think it practicable, but undesirable, far better than the one sought, however."

186 Fed. 1022, *Elkins Ry. Co. vs. Western Md. Ry. Co.* Same case on appeal:

"PRITCHARD, Circuit Judge. The learned judge who heard this case below prepared an exhaustive opinion clearly setting forth the various points at issue. We have carefully considered the record and the evidence that was heard by the court below, and in view of the facts and circumstances surrounding this case we are of opinion that the rulings of the lower court were eminently proper, in as much as the opinion of the lower court, reported in 163 Fed. 723, contains a full statement of the facts and deals with the various questions of law presented, de adopt the same as the opinion of this court. For the reasons stated, the decree of the lower court is affirmed."

CERTIORARI WAS DENIED ON THIS CASE, 223 U. S. 725.

141 Fed. 578, *So. Dakota Cent. Ry. vs. Chicago, M. & St. P. Ry. Co.*

"Although corporations engaged in business of a nature which requires them to serve the public are said to be public corporations, they are, in fact but private enterprises inaugurated for the benefit of their stockholders. While railroads are subject to use for the public benefit, they are owned, not by the public, but by corporations, which so far at least as ownership is concerned are private corporations, And if one such corporation may take the property of another, so as to deprive the latter of the use to which it was devoted, except in cases expressly authorized by the statute, or where public necessity demands such taking, there would be no reasonable limit to the conditions under which the power of eminent domain might be exercised. The full extent to which any of the courts have

gone upon this subject is that the land appropriated to a particular public use is not, under all circumstances, withdrawn from liability to be taken by legislative authority in the exercise of the power of eminent domain for another public use, with this qualification, that a special grant cannot be construed to authorize subversion of the former use, unless usch appears, by express words or by necessary implication, to be the legislative intent. As there is no statute in the state of South Dakota which authorizes the taking by one railroad of the right of way of another longitudinally, but the power granted is limited to the crossing or intersection of the right of way of another company and the uniting with its railroad, *the attempted condemnation proceedings of a portion of the right of way of the Milwaukee Company longitudinally cannot be sustained.*"

93 Pa. State, 159, *In re Pennsylvania Railroad's Appeal*:

This was a case in which the Pennsylvania Railroad attempted to take the property of a street railway in order to reach its depot. The Court said:

> "Now the appellant admits that it has entered upon and for its own uses and purposes has destroyed part of the plaintiff's road, but it attempts to justify its action in that it was necessary for it so to do in order to reach its depot on Dock Street. But the question recurs—how came it that this warehouse was placed in such a position that it became necessary to enter upon and cross Dock Street in order to reach it? The answer is found in the testimony of Mr. Kneass, the assistant to the President of the Railroad Company. He says the whole block from Walnut to Dock Street and from

Delaware Avenue to Water Street, excepting some stores fronting on Dock Street at the corner of Water Street, and at the corner of Delaware Avenue, was purchased for the use of a freight depot and the offices necessarily connected therewith. But we learn from the evidence of Mr. Trautwine, whose ability as an engineer no one doubts, that a practical entrance to this depot might be made either at the corner of Delaware Avenue, or at a short distance north of it. This, of course, would avoid any interference with the rights of the appellee. The appellant did not purchase or take as it might has done the property on the corner of Dock Street and Delaware Avenue and so was obliged to enter upon with its tracks and cross Dock Street in order to reach its warehouse. *The reason why this property was not purchased or taken is explained by the witness first above mentioned to have been that the necessities for that property were not imperative and the price therefor not satisfactory.* He also says further on that the reason for not purchasing this property WAS **ONE OF ECONOMY MERELY.** We thus discover that this necessity, by which the unlawful acts of this company, appellant, are sought to be excused is one of its own making—**A MATTER OF ECONOMY.** It is cheaper to use Dock Street and the appellee's franchise than to buy the property above mentiode. **A DEFENSE MORE WEAK OR ONE MORE BARREN OF EQUITY COULD SCARCELY BE IMAGINED."**

"The appeal was dismissed."

The Court will note that this case is on all fours with the case at bar. Neville admits that the route A-B one the maps into Jackson would be more direct and his reason for **NOT** taking that route was economy.

134 Fed. 973, *Evansville & H. Traction Co. vs. Henderson Bridge Co.*

> "While a public service corporation, like a railroad company, is bound to render to the public certain services appropriate to its particular functions, it is not bound to permit its property to be subjected to use by a rival corporation, unless by express statutory enactment and by due process of law thereunder."

193 Ill. 217 (61 N. E. 1090), *Suburban R. R. Co. vs. Metropolitan R. R. Co.*:

In this case, one street railway company was attempting to condemn a portion of the line of another street railway company. The court said, on page 1092:

> "But one corporation cannot take the property of another already devoted to a particular use for the purpose of applying it to the same use. *Where there is no change in the use, there cannot be a change in the ownership under the law of eminent domain.* L. *C. & W. Ry. Co. vs. C. & E. Ry. Co.*, 112 Ill. 589. In this case, the proposed use is the same. It appears that petitioner desires to connect with another surface railroad at 52nd Street and it is doubtless desirable to run across this property for that purpose without deflecting from the direction of its original line. *There is, however, no physical obstacle to its taking another route and reaching the surface without taking this 30-foot strip.*"

112 Ill. 589, *C. & W. Ry. Co. vs. C. & E. Ry. Co.*s

> "In the absence of a clearly expressed intention to the contrary, the courts will not so construe a railway's charter as to authorize one company to

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take the property of another already devoted to a particular public use for the purpose of applying it to the same use. When there is no change in the use, it becomes a matter of mere private concern without at all affecting the public interest. This rule applies only when the taking would result simply in a change of ownership without affecting the use of the property sought to be taken."

214 Pa. 307 (63 Atl. 741) *Commonwealth, etc. Ry. vs. Bond*:

(Syllabus 2):

"Where a street railway is granted permission to lay its track in a street, allowing a later corporation to lay a part of its tracks on the tracks of the first company, **IS AN UNCONSTITUTIONAL TAKING OF THE PROPERTY OF THE FIRST COMPANY."**

(P. 742):

"This court has decided that while the Legislature may in the exercise of the right of eminent domain take franchises and property engaged in a public use and apply them to another public use, *a statute cannot be sustained which confers upon one corporation for profit a right to appropriate the property of another corporation to exactly the same public uses for the convenience and profit of the younger corporation.* P. & M. S. Ry. Co.'s Petition 203 Po. 354 (54 Atl. 191). * * * The rule in these cases is based upon the principle that the granting of the use of the tracks of a former company to a later company was the taking of property of the former company for the convenience and profit of a younger corporation and **THEREFORE IS UNCONSTITUTIONAL.** The principle

of these cases rule the case at bar. *To superimpose on the tracks of the former* company the whole, or any part of the tracks of a later company, is the taking of property of the former company within the meaning of the rule in the cases just cited. *There is no distinction in principle between the taking of the whole of the tracks of the former for the use of the later company and the taking of part of the tracks.*" 203 P. 608 (53 Atl. 513) *Commonwealth et al. vs. Uwchlan St. Ry. Co.;* 203 Pa. 354 (53 Atl. 191) *P. & M. St. Ry. Co.* (P. 792):

"**THE CONSTITUTIONALITY** of Section 14 with its amendment **IS DENIED.** Can its constitutionality, under the settled law, be sustained? For whatever might be our opinion of the justice or wisdom of such legislation, we would not strike down an act of the legislature, a co-ordinate branch of the Government, who are as much bound to obey the fundamental law as we, unless the act palpably violates that instrument. We are in no doubt as to just what power the Legislature intended to confer by these acts. It was a clear grant of a right to the younger to enter upon the easement of the older company, and take possession of 2500 feet of its track, poles and wires, thereafter to use them for its corporate purposes. It is not material that this possession was not to be exclusive. *In whatever light it is viewed, it was an authority to appropriate to a certain extent the franchises and property of the older company.* In our earlier judicial history, it was sometimes doubted whether the property of a corporation, used under its franchise for its own profit and the convenience of the public, could, under the right

of eminent domain, be again appropriated by the State, or by a second corporation which had been granted the right of eminent domain; but it has long since been settled that all private property may be taken for public use; that all property not purely public in private, whether it belongs to an individual or a corporation, aggregate or sole; that while a corporation aggregate may be created for public purposes, and be granted rights and immunities only because it serves the public, yet, the purpose of the members is private profit to be realized by serving the public, and in that sense the franchise and property it acquires, whereby the individual profit accrues to each member of the corporation, are private property, and may be appropriated to another public use by the State. The substance of all the authorities (and they are many) is as stated by Chancellor Walworth, 3 Paige 73; 'Notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property remains in the government, or in the aggregate body of the people in their sovereign capacities; and they have a right to resume the possession of the property in the manner directed by the Constitution and laws of the State whenever the public interest requires it.' But in addition to the power resting on the state's inherent right of severeignty, Section 3, Article 16, of our Constitution, declares: 'The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals.

"Therefore, the authority of the Legislature to confer on a corporation the right to take the franchise and property of an older corporation for

public use cannot be questioned. Whether it be expedient or wise for the Legislature to exercise this authority to take property for public use is purely a political question, and one solely for the Legislature. But whether the use to which it is sought to be appropriated, the property authorized to be taken *is a public use is a judicial question, for the determination of the courts.*L *Bridge Co. vs. Dix.* 6 Howard 507; *City of Pittsburg vs. Scott,* 1 Pa. 309; *Jessup vs. Loucks,* 55 Pa. 350; *Appeal of Stewart* ,EF *Pa.* DVC*; Appeal of P. N. & N. Y. R. R. Co.,* 120 Pa. 90; *Appeal of Edgewood R. R. Co.,* 79 Pa. 257; *Commission vs. Pa. Canal Co.,* 66 Pa. 41."

"In all these cases, the court decided whether the appropriation of the franchise of the older under the right of the eminent domain was a new and enlarged use for the benefit of the public and therefore such a 'public use' as brought it within the meaning of the Constitution. The first case cited (*Bridge Co. vs. Dix*), went to the Supreme Court of the United States on a writ of error to the Supreme Court of Vermont, the plaintiff in error averring that a statute of Vermont was in conflict with the Federal Constitution. The Bridge Co., in 1795, had been invested by the Legislature with the exclusive privilege of building a bridge over West River within four miles of its mouth, with the right to collect tolls from those passing over it, the franchise to continue for one hundred years. The corporation, under its franchise, constructed its bridge and enjoyed its profit until the year 1839, when another act was passed, authorizing the State Courts, whenever in their judgment the public good so required, to take any real estate, easement or franchise of another turnpike or other corporation for the purposes of a public highway

—to observe, however, the same rules in making compensation as provided by law in other cases where property was taken for public uses Upon the petition of Dix et al., proceedings were instituted for the construction of a public road or highway between certain terminals; the road passing upon and over the bridge, thus converting it into a free highway for all the public. Damages were assessed in favor of the Bridge Company, and paid into Court. The *Company denied the right of the Legislature to appropriate its franchise and property on the ground that such appropriation impaired its contracts with the State as implied by its charter, and therefore contravened the Constitution of the United States.* The Vermont courts decided against the Company and their judgment was affirmed by the Federal Court. Three opinions were filed in the United States Supreme Court concurring in this judgment against the Bridge Company. It was held that the franchise and property of the company was subject to the right of eminent domain and could be taken for public use by the State without impairment of the contract relation with the State, **if the second use to which the property was devoted was another and more beneficial to the public than the old one;** that the use for which it was taken, although practically of the same kind as that made of the bridge before, was a public use, in that thereafter it became free to all the public, whereas before it was limited to those who could pay or were willing to pay tolls; that the use was enlarged and more beneficial to the general public when free from tolls. The case was ably argued by Mr. Webster for the plaintiff in error, and by Mr. Phelps, *contra.* The opinions by the three Justices Daniel McLean and Woodbury, are very full and elabor-

ate. Nearly all the questions raised are discussed, and the cases in the different states bearing on them cited. *It will be noticed from an examination of the report that counsel for the defendant in error concedes, and the court assumes, that the franchise could not have been taken from one corporation for profit under the right of eminent domain in the State and vested in another private corporation of the same kind for profit.* The public use is made to depend on the fact that thereafter it was to be free. It was, therefore, not a transfer of the franchise and property of one corporation for profit to another of like character, but a taking for purely public use. In the constitutions of nearly all the states, their bills of rights and eminent domain articles are substantially the same as ours. In all their courts, on questions such as the one before us (*Bridge Co. vs. Dix, supra*), has generally been cited and approved. It has been cited with approval in our own court in the cases already noted. *In re Towanda Bridge Co.*, 91 Pa. 216, is an exactly similar case in its essential facts. It in effect decides that the growing necessities of a progressive age must be met by the exercise of the State's power of eminent domain. The public road appropriates the bridge path; the turnpike road, the public road; the electric railway, the trunpike road; the steam railroad, the canal bed. And so this court held so recently as *Harrisburg, C. & C. Turnpike Road Co. vs. Harrisburg & M. Elec. Ry. Co.*, 177 Pa. 585, 35 Atl. 850, 34 L. R. A. 600, where the railway company appropriated a small part of the road bed of the turnpike company under this same act of 1889; that the exercise of domain in that case was without doubt constitutional. The use was changed and greatly enlarged for the benefit of the public

by the younger corporation. **BUT IN NO CASE HAVE I BEEN ABLE TO FIND IN ANY OF THE STATES A JUDICIAL JUDGMENT UPHOLDING THE RIGHT OF ONE CORPORATION, FOR PROFIT, TO APPROPRIATE THE PROPERTY OF ANOTHER TO EXACTLY THE SAME USES FOR THE CONVENIENCE AND PROFIT OF THE YOUNGER CORPORATION.**

* * *

"The same assumed power which gives the right to take property already appropriated under a grant can lawfully confer domain without restriction on property not so appropriated. In fact, there is no serious obstacle in the fay of multiplying and constructing electric railways to meet every reasonable public demand for them. **IF THE NECESSARY COST OF CONSTRUCTION BE AN INSUPERABLE OBSTACLE,** unless property rights of like corporations be disregarded, **THEN THERE IS NOT THAT PUBLIC USE TO BE MET WHICH, WITHIN THE MEANING OF THE CONSTITUTION, WARRANTS THE GRANTING OF EMINENT DOMAIN.** A reasonable expectation of public partonage will always **tempt investment of capital. If,** however, under the law, the investment can be put in constant peril by the demands of a newer corporation for the property of the older, it may well be doubted whether, in the end, the public would not suffer from the refusal of capital to invest in improvements for public use. Capitalists will take the risk that in the indefinite future their franchise and property may be taken to answer the public necessities and demands for a newer and more improved method of travel and communication. **It is doubtful whether they would readily take the** risk of the appropriation of their franchise and

property by every organization instituted for precisely the same purpose under the general act of 1889; for there would then be no limit to the extent of the appropriation, except the cupidity of the new company and the will of the Legislature."

157 Mass. 364 (25 N. E. 92, L. R. A. 765), *Cary Library vs. Bliss*:

Mary Cary died, giving to the Town of Lexington, certain money to be used in the acquisition of the "Cary Library". The library was acquired and operated and subsequently additional gifts were granted to it. Thereafter an attempt was made by the State to condemn it and take it over for a new library.

"1. Held that, by the acceptance of the terms of the gifts, the town and the trustees agreed to the scheme of management proposed by the donor; that these subsequent gifts were made with reference thereto; and that without the consent of all parties, in the absence of any necessity for a change of management, **THE ACT WAS IN VIOLATION OF CONST. U. S. ARTICLE 1, PARAGRAPH 10, PROVIDING THAT NO STATE SHALL PASS ANY 'LAW IMPAIRING THE OBLIGATION OF CONTRACT'."**

"2. The statute further provided that the property, part of which consisted of money, should be taken, under the right of eminent domain 'to be held and applied in the same manner as if held by said trustees'. Held that, as there was no public necessity for the taking, **THE LEGISLATURE COULD NOT AUTHORIZE IT."**

On page 96, the Court said:

"The question arises whether *taking property from one party who holds it for a public use by*

another to hold it in the same manner for precisely the same public use can be authorized under the Constitution. Can such a taking be founded on a public necessity? It is unlike taking property for a public use which is already devoted to a different public use. There may be a necessity for that. In the first case, the property is already appropriated to a public use as completely in every particular as it is to be. Can the taking be found to be for the purpose which must exist to give it validity? In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the Legislature to say whether in a particular case the necessity exists. *We are of the opinion that the proceeding authorized by the statute was, in its nature, merely a transfer of property from on party to another, and not an appropriation of property to public use, nor a taking which was, or which could be found by the Legislature to be a matter of public necessity. Bridge Co. vs. Dix,* 6 How. 507; *Lake Shore & M. S. R. R. Co. vs. C. & W. R. Co.,* 97 Ill. 506; *C. & N. W. R. R. Co. vs. C. & E. R. R. Co.,* 112 Ill. 589. **FOR THESE REASONS, THE MAJORITY OF THE COURT ARE OF THE OPINION THAT THE STATUTE OF 1888, c. 342, IS NOT IN CONFORMITY WITH THE CONSTITUTION OF THE UNITED STATES."**

77 Conn. 83 (58 Atl. 467) *Star Burying Ground Assn vs. North Lane Cemetary Assn.*:

"A statute authorizing the condemnation of land will not be construed as applying to land already devoted to a public use, unless such application is clearly covered by the statute. * * * a condemnation of land actually appropriated to

and fully serving a public use, for the same use by a different owner, may be a condemnation only in form, and in reality be a mere compulsory transfer of the property from one private owner to another, *which it is beyond the power of the Legislature to provide for.*"

ISSUE No. IV.

UNTIL A RAILROAD HAS OBTAINED A CERTIFICATE OF PUBLIC NECESSITY FROM THE INTERSTATE COMMERCE COMMISSION, IT CANNOT BUILD A NEW LINE OR CONNECT WITH AN ESTABLISHED LINE NOR CAN IT AFTER OBTAINING SUCH A CERTIFICATE, DEVIATE FROM THE ROUTE THEREIN INDICATED WHEN BUILDING THE NEW LINE. NOR CAN IT RESORT TO STATE AGENCIES TO FORCE A JUNCTION WITH ANOTHER RAILROAD AT A POINT NOT ON THE ROUTE NAMED IN THE CERTIFICATE OF PUBLIC NECESSITY WITHOUT VIOLATING THE OTHER RAILROAD'S RIGHTS, PRIVILEGES AND IMMUNITIES UNDER THE INTERSTATE COMMERCE ACT AS AMENDED BY THE TRANSPORTATION ACT OF 1920.

The Court will recall that Art. 18, Sec. 1 of the Interstate Commerce Act provides:

> "No carrier by railroad subject to this Act, shall undertake the extension of its line of railroad, or the construction of a new line of railroad, shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over and by means of such additional or extended line of railroad unless and until

> **there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction and operation of such additional or extended line of railroad."**

The Jackson & Eastern Railway Company recognized in this instance the authority of this Section and sought and obtained from the Interstate Commerce Commission a certificate which is in the record as Respondent's Exhibit (R. p. 542), and which shows that the line authorized by the Interstate Commerce Commission was to be built **FROM SEBASTOPOL, MISSISSIPPI, TO JACKSON, MISSISSIPPI, NOT TO CURAN'S CROSSING.** The record shows conclusively that Curan's Crossing is not an intermediate point on the line between Sebastopol and Jackson, Mississippi. See 298 Fed. 488, *Lancaster vs. G. C. & S. F. R. R.*, where the Court stressed the necessity of obtaining consent from the Interstate Commerce Commission prior to the construction of a new line of railroad between any two points.

Said certificate of public necessity was apparently granted with reluctance, since in its opinion, which accompanied said certificate, rendered July 12, 1921, in Finance Docket No. 9, the Commission said (R. p. 541):

> **"The record as a whole fails to afford reasonable assurance that the project will become a permanently successful enterprise.** However, since **local interests are ready and willing to assume the burden with full knowledge of what the future may hold for the enterprise, it seems proper that they should be permitted to do so. But in view of the uncertain future of the road, we do not**

think it would be proper for us to sanction, at this time, the issuance of bonds to finance its construction."

Under the certificate of public necessity and under the law, both the Commission and the A. & V. Ry. Co. are entitled to have the J. & E. Ry. Co. build to Jackson, Mississippi, and not to Curan's Crossing. Certainly the A. & V. is entitled to be heard before the Commission before a railroad is built to Curan's Crossing, and the Commission is entitled to pass upon the proposed change in route. This right, privilege and immunity has been denied the A. & V. Ry. Co. by the decisions of the Supreme Court of Mississippi and to the extent that they authorize this the Mississippi Statutes conflict with the Federal Constitution and Statutes.

This record shows without contradiction that when the Jackson & Eastern Railway Company filed its application with the Interstate Commerce Commission for a certificate of public necessity for a line from Sebastopol, Mississippi, to Jackson, Mississippi, the Alabama & Vicksburg Railway Company made no appearance and it opposed no objection because it did not think that it was interested, R. p. 536. Had the J. & E. Railway Company, at that time, applied for a certificate of public necessity from Sebastopol, Mississippi, to Curan's Crossing, Mississippi, the ALABAMA & VICKSBURG RAILWAY COMPANY would have been entitled to notice and would have been entitled to be heard before the Interstate Commerce Commission in opposition to the issuance of such a certificate and it would certainly have availed itself of that opportunity and would have op-

posed the issuance of the certificate. If now, the Jackson & Eastern Railway Company is allowed under the aegis of a certificate of public necessity authorizing it to build from Sebastopol, Mississippi, to Jackson, Mississippi, to utilize a State condemnation court for the purpose of building a line from Sebastopol, Mississippi, to Curan's Crossing, Mississippi, the ALABAMA & VICKSBURG RAILWAY COMPANY has been deprived of its opportunity to be heard before the Interstate Commerce Commission in opposition to such a project. The vindication of this right, privilege and immunity which it has under the Interstate Commerce Act, as amended by the Transportation Act of 1920, is one of the things the ALABAMA & VICKSBURG RAILWAY COMPANY is seeking from this Court, in this proceeding.

President Neville, however, contended below, that because he filed a map with his application to the Interstate Commerce Commission which he says shows he intended to go to Curan's Crossing and thence by the A&V Ry. Co. rails to Jackson, Mississippi, the Interstate Commerce Commission when it issued the order authorizing him to build from Sebastopol, Mississippi, to **JACKSON, MISSISSIPPI,** thereby authorized him to build from Sebastopol, Mississippi, to Curan's Crossing and thence, **TO USE THE A. & V. LINE TO JACKSON, MISSISSIPPI.** The plain and complete answer to this is that after filing his petition and map, President Neville filed a second petition with the Interstate Commerce Commission, which is to be found in the Record at page 570, and which was filed on Dec. 10, 1921, or 5 months after the issuance by the Commission on July 12, 1921, of the Certificate of Public Necessity. In this

second petition the Jackson & Eastern Railway Company asked leave to use the Alabama & Vicksburg Railway Company's line from Curan's Crossing into Jackson, Mississippi.

On receipt of this second petition, the Secretary of the Interstate Commerce Commission wrote informally to Neville and Stone counsel for the J. & E. Ry. Co., the letter, Exhibit 4, page 547, in which he said that the Commission could not give him that right since he was not asking for leave to use terminals but was asking leave to use part of the A. & V. main line, thus conclusively demonstrating that both President Neville and the Interstate Commerce Commission construed the certificate of public necessity theretofore issued by the Interstate Commerce Commission as meaning what it said, namely, that the Jackson & Eastern Railway Company was authorized to build from Sebastopol, Mississippi, to Jackson, Mississippi, **BUT WAS NOT AUTHORIZED TO BUILD FROM SEBASTOPOL TO CURAN'S CROSSING, MISSISSIPPI, AND TO USE THENCE THE A. & V. RAILWAY LINE TO JACKSON, MISSISSIPPI.**

In this same petition the J. & E. had asked the Commission to grant it a junction with the A. & V. under p. 9 of Sec. 1, of the Act. Mr. McGinty in his letter also points out that that section as construed by this Court in 226 U. S. 14, applied only to existing lateral branch lines and that the J. & E. Railway was not an existing but only an embryonic lateral branch line. This application was still pending before the Interstate Commerce Commission when the condemnation suit was filed.

The direct line between Sebastopol and Jackson,

Mississippi, is considerably to the north of Curan's Crossing and by using that direct route the Jackson & Eastern Railway Company would reduce its distance into Jackson, Mississippi, by a mile and a half or more. This affirmatively appears from the record. See Map Exhibit B to Duffy's testimony, where the direct line has been drawn between the points (a)-(b) and the Map Exhibit A to Duffy's testimony, where the direct line has been drawn between the points (1)-(2). See also the testimony of Mr. Hayden, R. p. 371, and Mr. E. Ford, R. p. 383, and Mrs E. M. Durham, R. p. 406

TWO ALTERNATIVES.

This testimony makes it plain that if the Jackson & Eastern Railway Company wishes to go direct to Jackson, Mississippi, as authorized in the Order of the Interstate Commerce Commission, (R. p. 542), its best route would be the route along the line (1)-(2) marked out by Hayden on Exhibit A of Duffy's testimony. If it wishes to go to a connection with the Alabama & Vicksburg Railway Company then its best route is to utilize the route actually surveyed under directions of Mr. E. M. Durham, Jr., which route, Mr. Durham has sworn, (R. p. 403), would be a cheaper one to build and a cheaper one to maintain for the Jackson & Eastern Ry. Co. In **neither case is it proper or necessary to incur the hazards and difficulties of CURAN'S CROSSING.**

Marion & Eastern R. R. Co. vs. Missouri Pacific R. R. Co., Supreme Ct. Illinois, (19596), decided Oct. 28, 1925. Rehearing denied Dec. 3, 1925.

In this case defendant railroad company proposed to extend a track more than a mile in length,

covering territory already served by plaintiff's railroad, and if laid, was to used in interstate as well as intrastate commerce. Held that such additional track could not be termed a spur-track, but was rather an extension of the railroad line, and permission for its construction must be obtained from the Interstate Commerce Commission. The nature of such an extension of track depended on the facts in each case. Ordinarily a spur or industrial track was one used for loading, reloading, storing and switching of cars and for other services merely incidental to the regular train haul.

ISSUE No. V.

CERTAINLY NO STATE AGENCY HAS THE RIGHT TO IMPOSE UPON AN IMPORTANT INTERSTATE CARRIER A CONDITION WHICH WILL MAKE IT DANGEROUS TO THE LIFE AND LIMB OF ITS EMPLOYEES AND ITS PASSENGERS FOR IT TO OPERATE ITS TRAINS. THE ATTEMPT TO IMPOSE SUCH A CONDITION UPON IT IS A VIOLATION OF ITS RIGHTS UNDER THE FEDERAL CONSTITUTION PARTICULARLY THE COMMERCE CLAUSE AND THE CONTRACT CLAUSE AND UNDER THE INTERSTATE COMMERCE ACT AMENDED BY THE TRANSPORTATION ACT 1920.

The basis of the fifth ground upon which plaintiffs-petitioners seek relief is this: They contend that they have conclusively proven by **eminent, disinterested** engineers that the place arbitrarily selected for a junction by the J. & E. Ry. Co. is entirely improper and is highly dangerous. They point out that the A. & V. trainmen are unanimous in condemning the proposed junction as a death trap. They point out that it is shown **without contradiction** that there is a safe location for the junction at a point less than three miles distant, which junction

will be cheaper to build and cheaper to maintain, and they respectfully submit that the installation of this death trap junction will be a burden upon and an interference with interstate commerce. It will retard and endanger its interstate trains, its interstate freight and its interstate crews and passengers and its interstate roadbed and equipment. It will add to its operating costs and damage claims. It is in the truest sense an interference with and burden upon interstate commerce and as such relief from it and from the Mississippi statutes under which it is imposed is obtainable in this Honorable Court.

On this subject the record is as follows:

MR. S. A. NEVILLE, the defendant's own president, testified, p. 499:

> **"Q. DO YOU KNOW MR. NEVILLE OF ANY INSTANCE THAT YOU CAN NAME TO ME IN WHICH THERE HAS BEEN ESTABLISHED A UNCTION BETWEEN TWO RAILROADS AT A POINT WHICH WAS ON THE OUTSIDE OF A CURVE, AS A 10-FOOT FILL BETWEEN TWO 400-FOOT TRESLES, IN THE IMMEDIATE VICINITY OF A HIGHWAY CROSSING AND IN THE FLOOD REACH OF AN UNRULY RIVER?**
>
> **"A. I DON'T KNOW AS THERE IS SUCH A ONE ANY WHERE ELSE IN THE WORLD."**

R. p. 615, MR. E. M. DURHAM, JR., swore:

> "Answer No. 2. During the past twenty years I have been employed in the maintenance of way and construction departments of the Southern Railway, in the valuation of the Atlanta, Birmingham & Atlanta Railway, in the executive department of the Southern Railway, and by the United

States Railroad Administration. I have, in that period, successively held the positions of assistant engineer, resident engineer, principal assistant engineer, executive (fol. 1184) general agent, assistant chief engineer and finally chief engineer with the Southern Railway; valuaation engineer with the Atlanta, Birmingham & Atlanta, manager, department of way and structures (another name for chief engineer), and finally director, division of liquidation claims with the United States Railroad Administration."

R. p. 616, Mr. E. M. Durham, Jr., swore:

"Int. No. 6. If you state that you are familiar with the said proposed junction, please give (a) the physical conditions of the track of the Alabama & Vicksburg Railway Company at that point and of the proposed track of the Jackson & Eastern Railroad Company at that point; and (b) state your opinion, as an engineer of the proposed point of junction, giving your reasons fully?

"Ans. No. 6. (a) The proposed track of the Jackson & Eastern Railroad connects with the main line of the Alebama & Vicksburg Railway on the outside of a 1 degree 50 minute curve, about 750 feet east of the west end thereof, and extends northerly on a curve in the reverse direction; the proposed junction is about midway between two 400-foot trestles on the Alabama & Vicksburg Railway main line, which are about one-quarter mile apart; and it is immediately east of an important highway crossing; the Alabama & Vicksburg Railway embankment at that point is about 10 feet high. (b) **IN MY OPINION, IT WOULD BE DIFFICULT TO FIND A WORSE LOCATION FOR THIS JUNCTION,** between pearson and the Pearl Rirevr; it means a facing point switch

on the outside of a curve, where fairly high speeds are normally maintained, and the necessary reduction of the elevation of the outer rail, thus increasing the hazard of derailment; (fol. 1186) turnouts on the outside of a curve should never be permitted except in cases of extreme necessity; when Alabama & Vicksburg trains are stopped at this proposed junction, either to pick up cars or to allow Jackson & Eastern trains to clear the hazard to trainmen, compelled by their duties to alight, is increased by reason of the height of the fill at this point, and the trestles (mentioned above) on either side of the junction; this is especially true at night. Because of the curvature the distance at which enginemen can see whether this turnout is clear is greatly reduced; if sidings for the interchange or switching of cars are constructed, which would be necessary, this would be magnified. The location of an important highway crossing, practically at the switch of the junction, will interfere with switching, thereby blocking the main line for a greater length of time, and, most important of all, greatly add to the danger and inconvenience of that portion of the public who use the highway.

"Int. No. 7. Have you made any studies to determine whether a junction between the proposed line of the Jackson & Eastern Railroad and the Alabama & Vicksburg Ry. Co. may be made elsewhere between Jackson and Pearson's Station, Mississippi?

"Ans. No. 7. I have.

"Int. No. 8. Please state the relative merits of the proposed junction point between the Jackson & Eastern Railroad and the Alabama & Vicksburk Railway near Curan's Crossing, Mississippi, suggested by the Jackson & Eastern Railroad Company, and of any other junction (fol. 1187) point between Jackson, Mississippi, and Pearson Station,

Mississippi, which you may have in mind?

"Ans. No. 8. East of the Pearl River and north of the Alabama & Vicksburg Railway the hills parallel the river at a distance varying from two to three miles as far north as Drake's Church. (See Government topographical map.) Between the hills and the river within this area the ground is low and much of it is swamp, most of it is subject to overflow during the periodic floods of the Pearl River. The present Jackson & Eastern Railroad location leaves the foot hills near Drake's Church and follows, substantially, the highway from that point to the proposed junction at Curan's Crossing. As the ground along this route is low, and subject to overflow, the present line, if adopted, should be provided with a large amount of trestle work in order that the flood waters from the river may be carried off in part through the swamp which lies between the foot hills and the main channel, as is the case at present; if frequent trestles are not provided, the danger of WASHOUTS, WHICH ARE HIGHLY PROBABLE IN ANY EVENT, is greatly enhanced. If this danger could be altogether obviated by following the foothills more closely, at a reasonable construction cost, it would seem the part of wisdom to do so. With this in view, I made a reconnaisance of this territory and had a survey made of an alternate route between Drake's Church and the Alabama & Vicksburg Railway, joining the latter at a point about 2½ miles east of the proposed connection at Curan's Crossing. The result is shown on drawing attached (marked exhibit 'A'). It will be noted that:

"(Fol. 1188.) (1) A straight line may be secured on this route.

"(2) It is of substantially the same length as the Jackson & Eastern Railway survey.

"(3) The grading is about as light as could be desired for proper drainage.

"(4) A nearly level grade can be secured.

"(5) It is altogether clear of the Pearl River overflow.

"(6) The only trestle work necessary is that required to care for drainage from the foothills.

"(7) It does away altogether with the objections cited to the connection at Curan's Crossing.

"I have not seen a profile of the Jackson & Eastern Railroad location but have been over the ground; I have no hesitation in stating, however, that if some consideration to the drainage is given in planning the work o nthe two routes, **THE ALTERNATE ROUTE SUGGESTED ABOVE WILL BE CHEAPER, BOTH TO CONSTRUCT AND TO MAINTAIN.** Construction will be cheaper because less trestle work is required and because the cuts will provide a portion of the material to make the fills, the Jackson & Eastern Railway location would be practically all fill, if proper practices are followed. Maintenance will be cheaper because of better soil conditions, better drainage, and less trestle work."

Record, page 201, **MR. A. A. WOODS** swore:

"Q. What is your name, residence and occupation, Mr. Woods?

"A. A. A. Woods; residence, Cincinnati; occupation, chief engineer for the maintenance of the western lines of the Southern Railway.

"Q. How many miles of track, approximately, have you under supervision?

"A. About four thousand miles.

"Q. Have you any engineer's degree from any educational institution?

"A. Yes, sir; Tulane University of New Orleans.

"Q. How long have you been engaged in railroad engineering?

"A. In the neighborhood of twenty-seven years.

"Q. Have you been engaged in any other occupation since your graduation from the Tulane University?

"A. No.

"Q. You got your degree there in 1895?

"A. 1895.

. . . .

Record, page 202:

"Q. Have you any connection with the A. & V. Railway Company?

"A. No.

. . . .

Record, page 203:

"Q. The A. & V. Railway Company at Curan's Crossing is on a grade or fill of from 8 to 10 feet, and it is on a curve and the crossing is between two trestles, and is in Pearl River bottom. I would like to ask you if, in view of these facts, you consider the point, approximately at Curan's Crossing, as a proper or improper place for a junction say of the A. & V. Railway and a proposed new railroad built from Sebastopol, Mississippi, to this point east of Pearl River?

"A. I CONSIDER THAT POINT FOR A CONNECTION PROBABLY THE MOST OBJECTIONABLE THAT COULD BE PICKED OUT BETWEEN PEARL RIVER BRIDGE AND PEARSON.

"Q. You have studied this map, Exhibit 'F', which lies on the table before you, which shows the proposed point of connection?

"A. Yes, sir.

"Q. State why you say that the proposed point of connection is probably the most objectionable

point that you could find between Pearl River and Pearson?

"A. There is a trestle just west of the crossing usually known as Farish Bridge, and when the water of Pearl River is in its high stages it goes over the trestle with great force, seeking the line of the river below the A. & V. and in connection with what we have already had there if this proposed junction is put in, that would tend to increase that current and volume of water going over the bridge, which would (fol. 402) have a tendency to cut out the embankment at the ends of the bridge.

"This connection is also on a curve and any switch turnout from the main track is more difficult on a curve. It is more difficult to do switching on a curve; it is more apt to cause derailment that would be on a tangent track. Another difficulty about the connection is the super-elevation of the outer rail on the curve. In this case, the super-elevation of the track coming in would be on one side, and the super-elevation of the A. & V. would be on the other side. That would be difficult.

"Q. Explain to the Court what would be the effect of that condition?

"A. The effect would be to break the old elevation of the A. & V. to make this connection safely.

"Q. Are there any other objections to that point from your observations of the conditions there?

"A. There are objections to these trestles, one on each side of the connection. If it was necessary to do switching at that point, set out and pick up cars, it would leave the train hanging over one or the other of these trestles, and the trainmen would be in danger if they attempted to couple or

uncouple cars on the trestle, or even if they attempted to go by the train on the side of the trestle.

"Q. In view of all these difficulties which you have enumerated what in your opinion as a railroad engineer and a railroadd operative would you say as to the desirability or undesirability of this proposed junction?

"A. It is decidedly undesirable." R. p. 204.

See also the testimony of Mr. Jones, p. 86; Mr. Ford, p. 374, *et seq.*; Mr. Stamm, p. 143, *et seq.*

MR. LEE EVANS swore that he had been a conductor on the A. & V. Railway for nearly twenty-two years and (R. p. 107) was general chairman of the Conductors' Union; that his duties required him to go over this proposed junction on his train **THIRTY-FOUR TIMES A MONTH**, with interstate trains.

He swore (R. p. 106):

"Q. Explain to the judge what that is?

"A. The reason, Mr. Monroe, is that this is on a curve and on a fill, and it makes it dangerous to operate trains by there, and even more so than it would be if it was on a level and straight piece of track. A point of intersection of that kind necessitates more or less switching, and my experience is that at a crossing like this one causes many difficulties and objections. At a place of this kind it is really impractical to do any switching at all for the reason the engineer cannot see the signals. To give the signals the trainmen would have to go on the opposite of the train from where their work was, the switching was being done, and the fact that it is on a fill would be an additional objection.

(R. p. 109):

"Q. State what your opinion is in regard to this being a dangerous point for a connection?

"A. **MY OPINION IS THAT IT IS A DEATH TRAP FOR THE MEN EMPLOYED TO DO WORK THERE.**

. . . .

"Q. Mr. Evans, please state whether or not you have received any complaints of this proposed point of junction from the men operating trains along there?

"A. Yes, sir. From particularly every man we have got.

"Q. Has made complaints?

"A. Yes, sir. They have made this complaint, that there ought to be something done about having a connection with any railroad at a place of this kind." (R. p. 110.)

MR. ED GRAHAM swore, page 128, that he was a passenger locomotive engineer; that he had been running on the A. & V. Railroad thirty years, and that his duties took him over this proposed junction (R. p. 128) **THIRTY-FOUR TIMES A MONTH** (R. p. 129); that he was chairman of the Locomotive Engineers.

He swore (R. p. 129):

"Q. Has any complaint been made to you as such chairman of the locomotive engineers of the Alabama & Vicksburg Railway to this proposed junction?

"A. Yes, sir.

(R. p. 130.) "Q. Answer the question, please, have any complaints been made?

"A. Yes, sir.

"Q. Will you please state what the objection to this proposed junction is?

"A. My men object to it.

"Q. State what your objection is?

"A. I will give my objection, which is the objection of all the men of the railroad. * * *

"Q. Mr. Graham, from the point of view of this being on a curve, state what dangers there would be as to this proposed point of junction being on a curve?

"A. **WELL, IT IS MERELY A DEATH TRAP FOR THE TRAINMEN; IT IS JUST A DEATH TRAP, THAT IS THE WAY WE CONSIDER IT.**

R. p. 131:

"Q. What crossing is that?

"A. It is known as Curan's Crossing, and the crossing is on a fill, which is dangerous. It is always a dangerous crossing.

"Q. What is the situation as to the fill there of the A. & V.?

"A. It is on a high fill. I say a high fill. I suppose it is ten feet or something like that.

"Q. What have you to say as to that in connection with the proposed junction?

"A. Just as I said before, it is a death trap for the trainmen doing the work on that fill. (P. 131.)

See also the Engineers' formal protest (R. p. 584), and of Conductors (R. p. 586).

Against this the J. & E. put on the stand not a single trainman who would operate over the proposed junction. As their main engineer they placed on the stand a man who a few months before had applied to the A. & V. Ry. Co. for the lowest position in its engineering corps, that of rodman (R. p. 332). Their witnesses all admitted

that if they had the option they would prefer to make a junction not on a curve nor on a fill, not at a public road crossing, not between two 400-foot trestles, and not in Pearl River Valley. (Neville, p. 495; Stacker, pp. 307, 308, 309; Duffee, pp. 265, 266.) But it has been located there, and as far as the Mississippi courts are concerned it may stay there. The A. & V. Ry. Co. therefore comes to this court for relief. Its contention is that to deliberately put a known danger into the operation of an interstate railroad which will endanger the lives of its trainmen and passengers and slow down its operation is to put a burden upon interstate commerce, and that any state statute which authorizes this is in contravention of the Commerce Clause of the Constitution and the Interstate Commerce Act as amended.

ISSUE NO. VI.

The provisions of the Constitution and Statutes of the State of Mississippi to the extent that they have been held by the Supreme Court of Mississippi to authorize the doing of these things, are unconstitutional as being violative of the Federal Constitution, particularly the Commerce Clause, Art. I, Section 8, Par. 3; the Contract Clause, Art. I, Section 10, Par I; the Fourteenth Amendment and the Federal Interstate Commerce Act as amended by the Federal Transportation Act 1920.

The Mississippi Supreme Court having held that the Statutes of Mississippi particularly Sections 1854 to 1877 and 4093 to 4099 inclusive, o fthe Mississippi Code of 1906 and Sections 184 and 190 of the Mississippi Constitution of 1890 grant to the Justice of Peace Court and the J.

& E. Railway Company, the rights objected to in Issues Nos. I to V inclusive, *supra*. We respectfully submit that said statutes so crushed are in conflict with the Commerce Clauce, Art. I, Sec. 8 §3, the Contract Clause, Art. I, Sec. 10, Par. 1, and the XIV Amendment and the Federal Constitution and with the Interstate Commerce Act as amended by the Transportation Act 1920, and that to the extent that they do so conflict they must be set aside.

All of which is respectfully submitted.

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MONROE & LEMANN,
Of Counsel.
February, 1926.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925

No. [redacted] 244

ALABAMA & VICKSBURG RAILWAY COMPANY
ET ALS., PETITIONERS,

vs.

JACKSON & EASTERN RAILWAY COMPANY,
RESPONDENT.

BRIEF OF JACKSON & EASTERN RAILWAY COMPANY IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI.

MARCELLUS GREEN,
GEORGE B. NEVILLE,
HARDY R. STONE,
Counsel for Jackson & Eastern Railway Co.

LIST OF CITATIONS.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 839.

ALABAMA & VICKSBURG RAILWAY COMPANY
ET ALS., PETITIONERS,

vs.

JACKSON & EASTERN RAILWAY COMPANY,
RESPONDENT.

BRIEF OF JACKSON & EASTERN RAILWAY COMPANY IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI.

IF THE COURT PLEASE:

It is alleged by the petitioners that the Jackson & Eastern Railway Company is seeking to acquire by its condemnation proceedings a part of the main line of the Alabama & Vicksburg Railway Company, and thereby destroy the con-

tinuity of petitioners' railroad from Meridian to Vicksburg, Mississippi. In its petition and brief on file in support thereof, the Alabama & Vicksburg Railway Company quotes only a portion of the application of the Jackson & Eastern Railway Company in the condemnation proceedings. When the entire application is considered it will be apparent that the only right which the Jackson & Eastern Railway Company seeks to acquire by the condemnation proceedings is a switch connection. The very pertinent portions of the Jackson & Eastern Railway Company's application, to which the petitioner has failed to call this court's attention, are the following:

> "Paragraph 2. That in order for this applicant to construct, maintain and operate its said railroad, it is necessary to connect its main line of railroad as now surveyed and definitely located with the main line of the Alabama & Vicksburg Railway Company, one of the defendants herein, with a switch turn-out at a point on the main line of the Alabama & Vicksburg Railway Company, and in the manner as hereinafter described."

The petitioner has quoted in its petition for a writ of certiorari the first part of Paragraph 3 of the application for condemnation, but omits the following part of Paragraph 3:

> "The connection which the applicant herein seeks to acquire by condemnation proceedings with the main line of the defendant the Alabama & Vicksburg Railway Company is to be a No. 9 turn-out and the use of 75-pound rail of the same character and design which is now in use on the main line of the Alabama & Vicksburg Railway Company at the point of connection. The said connection is to be

made as shown by said diagram, Exhibit 'A,' hereto, and is to be located so that the point of the left hand frog will be 1,867 feet east of the first box signal semaphore situated on the main line of the Alabama & Vicksburg Railway Company west of Curran's Crossing and east of Pearl River; the said turn-out to operate so that cars will be interchanged between the said Alabama & Vicksburg Railway Company and this applicant, and the said turn-out to be protected by a lock, and the main line of the said Alabama & Vicksburg Railway Company to be further protected by a derail switch which is to be placed on the rails of the applicant at a point 100 feet beyond the point of the frog of the connecting turn-out on the north rail of applicant's track, and the said derail switch to be kept locked open when not in use for the interchange of cars. The alignment of the Jackson & Eastern Railway Company's line adjacent to the main line of the Alabama & Vicksburg Railway Company is as shown by the map or diagram Exhibit 'A' hereto. * * * Switch ties to be used in the turn-out will be of white or post oak, of first-class grade, and seven-inch by nine-inch cross section, the installation to be made under competent supervision and in a workmanlike manner, in accordance with the standard practice of the A. & V. Railway Company" (R., --).

The Jackson & Eastern Railway Company was incorporated under Chapter 118 of the Code of 1906 of Mississippi. Section 4079, being a part of Chapter 118 of said Code, is as follows:

> "Every railroad corporation organized under the provisions of this chapter shall have and exercise the following powers, rights and privileges, viz:"

Then follows Section 4096, under which the condemnation proceedings were instituted:

> "4096. Seventeenth. To CROSS OTHER RAILROADS, ETC.—To cross, intersect, join, or unite its railroad with any other railroad heretofore or hereafter constructed at any points on their routes, and upon the ground of such other railroad company, with the necessary and proper turn-outs, sidings, switches, and other conveniences, and to exercise the right of eminent domain for that purpose."

Section 184 of the Constitution of 1890 of the State of Mississippi, is as follows:

> "Section 184. All railroads which carry persons or property for hire shall be public highways, and all railroad companies so engaged shall be common carriers. Any company organized for that purpose under the laws of the State shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with roads of other States. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad; and all railroad companies shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without unnecessary delay or discrimination."

The Constitution and laws of the State of Mississippi do not confer upon the Jackson & Eastern Railway Company and other railroads organized thereunder the power to condemn part of the main line of an existing road, nor has the Jackson & Eastern Railway Company sought by its condemnation proceedings to acquire a portion of the main line of the petitioner. It seeks nothing more than a switch

connection. The Supreme Court of Mississippi has so construed the application of the Jackson & Eastern Railway Company and the laws of Mississippi under which the condemnation proceeding was instituted. Alabama & Vicksburg Railway Company *versus* Jackson & Eastern Railway Company, 95 So. 733; Alabama & Vicksburg Railway Company *versus* Jackson & Eastern Railway Company, 101 So. 553.

The Supreme Court of Mississippi in its opinion on the second appeal found on page 555, 101 So., in referring to the contention of the Alabama & Vicksburg Railway Company, that the Jackson & Eastern Railway Company in its application for condemnation was seeking to acquire a portion of the main line of the Alabama & Vicksburg Railway Company, said:

> "Another question presented now, which was also in the former appeal, though not discussed in that opinion, is that the injunction should have been sustained, because the application for the condemnation of the right of way of the appellant, sought to condemn the ownership or fee in the strip of land of appellant's main line for the proposed connection purposes, whereas the law permits only the condemnation of an easement for a connection. We have examined and construed the language used in the application for condemnation, and while the words 'own, occupy and use' said strip of land, rights, privileges and easements above described would seem to indicate that it was an attempt to condemn the ownership in the strip of land to be used for connecting purposes, instead of the condemnation of an easement thereof, yet we think that, taking the application as a whole, the lan-

guage should be construed to mean that only an easement is sought to be condemned. Under the law an easement is all that could be secured by the condemnation proceedings, and we think that that was all that was intended to be condemned, and the judgment of condemnation must necessarily be limited to the acquirement only of an easement for the proposed connection. Therefore, we hold that the application when properly construed seeks only an easement which the appellee, Jackson & Eastern Railway Company, is entitled to under the law."

This court is bound by the construction of the laws of Mississippi and the legal effect of judgments rendered by the State courts, as given by the Supreme Court of the State: Thornton *versus* Duffy, 254 361; 65 L. Ed. 304. Ward *versus* Krinsky, 259 U. S. 503, 66 L. Ed. 1033; Quong Ham Wah Co. *versus* Acci. Commission, 255 U. S. 445; 65 L. Ed. 723; Farcomb *versus* Denver, 252 U. S. 7; 64 L. Ed. 424. Munday *versus* Wisconsin Trust Co., 252 U. S. 499; 64 L. Ed. 584. Pennsylvania Railroad Co. *versus* Towers, 246 U. S. 6; 62 L. Ed. 117. Wells, F. & Co. *versus* Nevada, 248 U. S. 165; 63 L. Ed. 190.

Every allegation contained in the bill filed by the Alabama & Vicksburg Railway Company in this case with reference to the dangers that would result in the proposed switching connections was specifically denied in the answer of the Jackson & Eastern Railway Company, and the testimony on each item of danger specified was conflicting. The witnesses for the Jackson & Eastern Railway Company were experienced railroad men, and testified from knowledge of conditions after a very thorough investigation. The following witnesses testified on behalf of the Jackson & Eastern Railway

Company: L. W. Duffee (R., ——); P. L. Stacker (R., ——); F. V. Vick (R., ——); S. A. Neville (R., ——).

The trial judge viewed the premises. The Supreme Court of Mississippi in its opinion, page 554, 101 So., with reference to the conflict in the testimony, said:

> "Many witnesses testified for the appellant Alabama & Vicksburg Railway Company. Their testimony went to establish the fact that the proposed connection would be unreasonable, improper, unduly dangerous to all concerned, and detrimental to both railroads, their employees, and the general public; and that a more reasonable connection could be made at a point a short distance further east on the main line of the appellant Alabama & Vicksburg Railway. Nothing would be gained by setting out in detail the testimony offered by the appellant on the question of fact presented, but it is sufficient to say that it was strong proof against the reasonableness and safety of the connection at the proposed point. The appellee, Jackson & Eastern Railway Company, offered many witnesses who testified positively that the proposed connection was reasonably safe, proper, and not unduly dangerous, and would not be injurious to the railroad or employees nor the general public interests. These witnesses, if believed, established the fact by their testimony that the proposed connection was reasonable and entirely proper. Their testimony appears to be clear and positive on the subject. The Chancellor personally visited the scene of the proposed connection and examined the physical conditions and observed the circumstances and general situation there. This information received by the Chancellor as trier of fact we assume was of considerable value as an aid to him in determining the truth from the conflicting testimony of the witnesses on

the opposite sides of the case, and the Chancellor found the fact to be that the connection sought was reasonable and proper, and dissolved the injunction, from which decree the Alabama & Vicksburg Railway Company now appeal, and appellee cross-appeals. Under the law of the case, all that was left to be tried by the lower court on the new trial was the question of fact as to the reasonableness, etc., of the proposed connection; therefore, the point for our decision on the present appeal is whether or not the finding of fact by the Chancellor is manifestly wrong and should be reversed. We have examined the testimony offered by opposing parties, and after a careful and lengthy consideration of it, we are convinced the finding of the Chancellor was amply supported by the proof, and we see no reason for a reversal of the finding of fact on the question directed by the former opinion to be inquired about by the lower court."

The findings of fact by the State courts in this case will be accepted by this court as conclusive: Pure Oil Co. *versus* Minnesota, 248 U. S. 158; 63 L. Ed. 180. Ward *versus* Krinsky, 259 U. S. 503, 63 L. Ed. 1033.

In its brief on the petition for writ of certiorari the Alabama & Vicksburg Railway Company lays great stress upon a certain petition signed by the employees of the Alabama & Vicksburg Railway Company protesting against the proposed connection. These petitions are referred to as matters of "human interest." We call the court's attention to the fact that the employees of the Alabama & Vicksburg Railway Company got the impression from some source that the Jackson & Eastern Railway Company was seeking by the condemnation proceedings to take from the Alabama &

sburg Railway Company a portion of its main line, and to run its trains over the main line of the Alabama & sburg Railway Company. The original bill filed by A. & V. in this case charges that the Jackson & Eastern way Company is seeking by the condemnation proceed- to acquire the ownership of a part of the main line of Alabama & Vicksburg Railway Company, and was also ng the right to use the main line into Jackson. We seen from the consideration of the opinion of the Su- e Court of Mississippi that the Jackson & Eastern Rail- Company will acquire no such rights and privileges by ondemnation proceeding. These erroneous contentions he Alabama & Vicksburg Railway Company seem in way to have gotten into the witness room and ma- ly influenced the testimony of its witnesses. L. E. s, a conductor, and one of the principal witnesses of the ama & Vicksburg Railway Company, testified as fol- on cross-examination:

"Q. Did you understand in your testimony that this switching connection would give the Jackson & Eastern the right to use the main track of the Alabama & Vicksburg?

"A. Why did they want the connection if they don't expect to use the line of the A. & V.?

"Q. It is your understanding that they will use the line of the A. & V.?

"A. That they would use the A. & V., that is my understanding" (R., —).

rther along in his cross-examination this same witness ied as follows:

"Q. Now let's get back to the junction point. Do you understand that the J. & E. wants to use the track of the A. & V.?

"A. If they don't want to use it, why are they seeking this junction?

"Q. I asked you if it was your understanding that the Jackson & Eastern wanted to use the main line of the A. & V.?

"A. And I answered you by saying if they don't want to use it, why are they seeking this junction?

"Q. Did I understand that you understood that they were going to undertake to run their trains on the A. & V. railroad track?

"A. I think I have answered that question.

"Q. Let me ask you again simply as I can, is it your understanding that the Jackson & Eastern will by its own switch engines and crews run its trains if this connection is made on the A. & V. tracks?

"A. I can't see why they want this connection if they don't want to use the tracks of the A. & V." (R., —.)

HAS CONGRESSIONAL LEGISLATION WITH REFERENCE TO PHYSICAL CONNECTION OF INTERSTATE RAILROADS SUPERSEDED LAWS OF THE STATE OF MISSISSIPPI DEALING WITH PHYSICAL CONNECTION OF RAILROADS? IN OTHER WORDS, HAS CONGRESS TAKEN ENTIRE CHARGE OF THE FIELD OF PHYSICAL CONNECTION OF RAILROADS ENGAGED IN INTERSTATE COMMERCE?

The following principles are well established by the decisions of this court:

(1) To have the effect of superseding state statutes, it is not sufficient that congressional regulation of commerce in-

les the same field. It must expressly cover the precise ject matter or show a purpose to take legislative posses- n of the whole field. Reid *versus* Colorado, 187 U. S. ; 47 L. Ed. 108. Sinnot *versus* Davenport, 22 Howard, ; 16 L. Ed. 243. Savage *versus* Jones, 225 U. S. 501. ssouri Railroad Company *versus* Harris, 234 U. S. 412; L. Ed. 1377.

(2) The fact that Congress has intrusted to the Inter- e Commerce Commission certain national powers in re- ct to interstate commerce, does not, in the absence of ion by it, change the rule as to the authority of the State act when Congress has not acted. Missouri Pacific Rail- d *versus* Larabee Flour Mills Co., 211 U. S. 612; 53 L. . 352. *Corpus Juris*, Volume 12, Section 14, page 17.

The petitioner Alabama & Vicksburg Railway Company tends that the second paragraph of Section 3 of the Inter- e Commerce Act, as amended by the Transportation Act 1920 shows that it was the purpose and intention of Con- ss to supersede all State legislation with reference to ysical connection of railroads. This amendment is as lows:

> "(3) All carriers engaged in the transportation of passengers or property subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares and charges between such connecting lines, or unduly prejudice

> any such connecting line in the distribution of traffic that is not specifically routed by the shipper." U. S. Statutes at Large, Vol. 41, page 479.

In addition to the above we call the court's attention to Section 8563, Compiled Statutes of the United States, Edition of 1918, which is as follows:

> "Any common carrier subject to the provisions of this act upon application of any lateral branch line of railroad or any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms switching connection with any such lateral branch line of railroad or private sidetrack which may be constructed connecting with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of same."

This section further provides that if any common carrier shall fail to install and operate such switch

> "such shipper or owner of such lateral branch line of railroad may make complaint to the commission as provided in Section 13 of this act, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof, and justification and reasonable compensation therefor, and the commission may make an order as provided in Section 15 of this act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be in force as hereinabove provided for the enforcement of all other orders by the Commission other than orders for the payment of money."

This last mentioned statute has been a part of the inter-
ate commerce act for a number of years, long prior to the
ansportation act of 1920. This court in the case of United
tates *versus* Baltimore & Ohio Southwestern Railroad Com-
any, 226 U. S. 14; 57 L. Ed. 104, considered the scope and
ffect of the above statute. The Interstate Commerce Com-
ission on the application of the Cincinnati & Columbus
raction Company had entered an order directing the Balti-
ore & Ohio Southwestern Railroad Company to establish
witching connections with the road of the said Cincinnati &
olumbus Traction Company. Suit was brought by the
altimore & Ohio Southwestern Railroad Company to set
ide this order of the Interstate Commerce Commission.
his court, speaking through Mr. Justice Harlan, said, in
ie above case:

> "It will be seen, without much argument, that unless the traction company is a lateral branch line of railroad, the trunk line carriers, the appellees, are not subject to the requirement of the statute so far as the traction company is concerned, the words 'lateral branch line' do not refer to what the applicant may become or be made by order of the commission, but to what it already is when it applies. The power of the commission does not extend to order a connection wherever it sees fit, but is limited to a certain and somewhat narrow class of line. The most obvious examples of such lines are those that are dependent upon and incident to the main line—feeders, such as may be built from the mines or forests to bring coal, ore or lumber to the main line of shipment."

Now the contention is that because Congress has legislated with reference to switch connections between "a certain and somewhat narrow class of line," therefore all State legislation relating to switch connections between railroads engaged in interstate commerce are annulled, and that the State can not now enter the field of forcing physical connections between railroads engaged in interstate commerce. We submit that the decisions of this court, which lay down the general principles which are to guide the court in determining whether or not congressional legislation has superseded State legislation, dealing with interstate commerce and its instrumentalities, make it plain that the congressional legislation referred to above has not superseded the statutes of Mississippi under which the condemnation proceeding was instituted. We refer only to some of the leading cases of this court laying down general principles. Missouri, K. & T. Railroad Company *versus* Harris, 234 U. S. 411; 58 L. Ed. 1378; Reid *versus* Colorado, 187 U. S. 137; 47 L. Ed. 108; Savage *versus* Jones, 225 U. S. 501; 56 L. Ed. 1182.

We call the court's attention to the following language used by this court in the case of Savage *versus* Jones, 225 U. S. 503, 56 L. Ed. 1183:

> "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulations and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. This principle has had abundant illustration."

As indicating the mind of Congress in the enactment of the Transportation Act of 1920, on the question of depriving the States of police power over instrumentalities of interstate commerce, we call your honors' attention to the following proviso to Paragraph 17, Section 402, of the Transportation Act of 1920, found on page 477, of United States Statutes at Large, Volume 41:

> "Provided, however, that nothing in this act shall impair or affect the right of the State in the exercise of its police power to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the commission made under the provisions of this act."

We also call the attention of the court to Paragraph 22 of Section 402, of the Transportation Act of 1920, found on page 478 of the United States Statutes at Large, Volume 41, which reads, as follows:

> "The authority of the Commission conferred by Paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or sidetracks located or to be located wholly within one State, or of street, suburban or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation."

This court in the case of State of Texas *versus* Eastern Texas Railroad Company, 258 U. S. 204, 66 L. Ed. 566, in referring to the scope of the Transportation Act of 1920, said:

> "As a whole these acts show that what is intended is to regulate interstate and foreign commerce, and

to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce."

The jurisdiction conferred upon Interstate Commerce Commission by the Transportation Act (Federal Statutes Annotated, 1920 Supplement) is excluded in the case at bar by paragraph (22), page 99, providing "(22) the authority of the Commission conferred by paragraphs (18 to 21) both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks located, or to be located, wholly within one State, or of street, suburban or interurban electric railways, which are not operated as a part or parts of a general steam railway system of transportation." This section is particularly applicable for it applies to the "construction" of "switching tracks located wholly within one State."

Thus the police power of the State under its constitution and statutes in the eminent domain proceedings of rights of way for switch tracks is in no wise affected by the Transportation Act and the authority of the Commissoin thereunder.

This section (22) is not in conflict with paragraph 3, section 3, but is a limitation upon the powers of the Interstate Commerce Commission touching the construction of switch tracks located wholly within one State.

This limitation is recited and the case differentiated in:

Lake Erie A. & W. R. R. Co. *vs.* Public Utilities Co., 141 N. E. (Ohio) 847.

wherein the court says:

> "While a connection between railroads is the avowed object of the proceeding, this record discloses that the true purpose of this controversy is the desire to share in the coal car supply of the New York Central Railroad. The applicant railroad in its sixty miles of length has, at least, six other connections."

The order of the Interstate Commerce Commission and the opinion of the Court in the above case is based upon the proposition of the effect upon interstate commerce and not the construction of a switch track. The connection there sought was between two main line carriers of their main lines and not a switch connection as here, and both the Commission and the Court, after considering the effect of such connection, held that it would materially affect the interstate commerce and be very injurious to the commerce of the New York Central in the operation of its road and in causing an expense to it of two million dollars.

A switch to be built under condemnation at the expense of the condemnor between two railroads was not involved; and that the jurisdiction of the Commission was not invoked as to such a switch connection is manifested by the fact that there were six connections between those two trunk line carriers within the sixty miles of the length of one of them. One proposition involved in the case of Lake Erie A. & W. Railroad Company *versus* Public Utilities Company, *supra*, was the conflict of jurisdiction between the Interstate Commerce Commission, whose jurisdiction was conceded, and the Ohio Public Service Utilities Commission wherein the court held that where jurisdiction was concurrent, the jurisdiction of the court first obtaining and

exercising jurisdiction was exclusive. On this phase of the case the court said:

> "We are confronted with the situation where a jurisdiction voluntarily invoked HAVING BEEN EXERCISED, its effect cannot be denied."

It is contended by the petitioner for certiorari in the case at bar that the jurisdiction of the Interstate Commerce Commission was invoked by the Jackson & Eastern Railway Company, but they do not contend that the jurisdiction of the Interstate Commerce Commission was "exercised." The fact is that the Interstate Commerce Commission held that it did not have jurisdiction of the petition filed by the Jackson & Eastern Railway Company on December 10, 1921, as will be seen by a letter addressed to the attorneys of the Jackson & Eastern Railway Company by the Secretary of the Interstate Commerce Commission, of date February 7, 1922, wherein the Secretary said:

> "On December 10th, 1921, you filed with the Commission, on behalf of the Jackson & Eastern Railway Company, a complaint against the Alabama & Vicksburg Railway Company under docket No. 13361, in which you pray that the Commission issue an order authorizing, directing and requiring a physical connection between the Jackson & Eastern Railway Company and the Alabama & Vicksburg Railway Company at a point, described in the complaint, east of the Pear River, and also authorizing, directing and requiring the Alabama & Vicksburg Railway Company to permit the use of said portion of its main line from the point of said proposed physical connection to a point on the west side of the Pearl River on Commerce Street in the

city of Jackson, Miss., for the purpose of enabling the Jackson & Eastern Railway Company to run its engines, trains, and cars over the said portion of the main line of the Alabama & Vicksburg Railway.

"You invoke the authority of the Commission under paragraph 9 of section 1, and paragraph 4 of section 3.

"Your complaint has been considered by the Commission, and I am directed to call your attention to the decision of the Supreme Court of the United States in U. S. *versus* B. & O. Southwestern Ry., 226 U. S., 14, wherein the Court construed paragraph 9 of section 1, the Court said:

" 'The words "lateral, branch line" do not refer to what the applicant may become or be made by order of the Commission but to what it already is when it applies. The power of the Commission does not extend to ordering a connection wherever it sees fit, but it is limited to a certain and somewhat narrow class of lines. * * * But here, as we have said, this determination of the Commission that the applicant shall be a branch line is not enough; the applicant must be a branch before it applies. That is the absolute and reasonable condition. That some shippers would be accommodated by a switch connection is not enough.'

" 'It seems clear that under this provision of the act the Commission is without authority to grant the relief prayed for' " (R., —).

After the receipt of the above communication from the Interstate Commerce Commission, the Jackson & Eastern Railway Company abandoned its petition filed with the Interstate Commerce Commission and the same was thereafter dismissed as admitted by the petitioner while in the case of Lake Erie A. & W. R. R. Co. *versus* Public Utilities Com-

pany, *supra*, the matter was fully heard and decided by the Interstate Commerce Commission.

The petitioner for certiorari also relies upon the case of

Ex Rel. People New York Central Railroad Company *versus* Public Utilities Co., 233 N. Y., 113; 135 N. E., 195,

wherein there was a question of main line, and not switch, connection at issue and in which it was contended that section 1, as amended by section 402 of the Transportation Act (paragraphs 18 and 21), page 99, by (22), *supra*, was controlling, but the Court held that this paragraph did not apply because "the track ordered to be constructed was not a spur, industrial, team, switching or side track, but rather, as stated in the order of the Commission, was a track connection between two roads of relator and the Lehigh Valley and said two roads were also commanded to lay and install such tracks as may be necessary to furnish adequate and convenient interchange of freight between said railroads."

Thus both Lake Erie, A. & W. R. R. Co. *versus* Public Utilities Company and People *ex Rel.* New York Central R. R. Co. *versus* Public Utilities Company, *supra*, so much relied upon by petitioner in this proceeding, are clearly not applicable to the case at bar. Counsel for petitioner does not cite any decisions of this court, or any other Federal Court, applicable and the foregoing decisions of the State courts are clearly not authority for the position assumed.

The contention that the Jackson & Eastern Railway Company's purpose in the future is to obtain use of the terminal and bridge of the Alabama & Vicksburg Railway Company after it obtains switch connections, is held by the Supreme

Court of Mississippi in this case without any merit in that, future acts, predicated upon the existence of a switch, could not now be considered; and in Western Union Telegraph Company *versus* Louisville & Nashville Railroad Company, 107 Miss., 626; 65 So., 650; where it was contended that in the future the Telegraph Company would use the right of way for other purposes than specified in the condemnation proceedings, it was held that the Court would not consider any such contention in the condemnation proceedings and that, if the judgment in the condemnation proceedings was thereafter used for other purposes, then injunction would lie. This latter case was affirmed by the Supreme Court of the United States, 250 U. S., 362; 63 Law Ed. 1032.

In addition to the decisions of this Court, already cited by us in this brief in support of our contention that the Transportation Act of 1920 did not supersede the statutes of Mississippi with reference to physical connections of railroads, we refer the Court to the following cases:

Norfolk & Western R. R. Co. *versus* Public Service Co., 82 W. Va., 408; 96 So. Eastern, 62.

Washington & O. D. R. R. Co. *versus* Royster Guano Co., 122 Va., 397.

Wisconsin Railroad Company *versus* Jacobson, 179 U. S., 287; 45 Law Ed. 194.

Chicago R. R. Co. *versus* State, 53 Okla., 712.

As clearly appears from the communication from the Interstate Commerce Commission to the attorneys of the Jackson & Eastern Railway Company, above referred to, the Commission is of the opinion that the Transportation Act of 1920 does not confer jurisdiction upon it to force the

connection herein sought. The contention of the petitioner is that the jurisdiction of the Interstate Commerce Commission is exclusive. It is inconceivable, we submit, that Congress would have conferred exclusive jurisdiction upon the Interstate Commerce Commission of a matter of such local concern. Finally, we submit that even though the Interstate Commerce Commission has authority under the Transportation Act of 1920 over the switch connection between two railroads engaged in interstate commerce, still the States under their police power, have the power, in aid of intrastate commerce, to require two railroads such as the two roads here involved to connect their lines by switch tracks. This Court held in the case of the State of Texas *versus* Eastern Texas R. R. Co., 258 U. S., 204; 66 Law Ed., 566, that the Interstate Commerce Commission had no authority under the Transportation Act to authorize an intrastate railroad to abandon its intrastate business. Now, we submit that the converse of this proposition is true; that is, that the Interstate Commerce Commission has no authority to force switch connections between two intrastate railroads in so far as intrastate business is involved.

We submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

MARCELLUS GREEN,
GEORGE B. NEVILLE,
HARDY R. STONE,
Counsel for Jackson & Eastern Railway Co.

MARCH 3, 1925.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 244.

WRIT OF ERROR AND CERTIORARI TO SUPREME COURT OF MISSISSIPPI

ALABAMA & VICKSBURG RAILWAY COMPANY,

ET ALS., PLAINTIFFS IN ERROR AND PETITIONERS

vs.

JACKSON & EASTERN RAILWAY COMPANY,

DEFENDANT IN ERROR AND RESPONDENT.

BRIEF ON BEHALF OF DEFENDANT IN ERROR AND RESPONDENT.

MARCELLUS GREEN,
GEORGE B. NEVILLE,
H. R. STONE,
Attorneys for Defendant in Error and Respondent, Jackson & Eastern Railway Company.

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vs.

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BRIEF ON BEHALF OF DEFENDANT IN ERROR AND RESPONDENT.

STATEMENT OF CASE.

IF THE COURT PLEASE:

The Jackson and Eastern Railway Company, an intrastate railroad, chartered by the State of Mississippi, was proceeding to construct its railroad within the State of Mississippi, and, after obtaining a certificate of public

necessity from the Interstate Commerce Commission, (Record 538), desired to make a switch connection with the Alabama and Vicksburg Railway Company, an intrastate railroad, chartered by the State of Mississippi, at a point near the suburbs of the City of Jackson, called "Curan's Crossing," and after applying to the Interstate Commerce Commission for authority to make said switch connection (Record 547), with notice to the Alabama and Vicksburg Railway Company, the Interstate Commerce Commission held it had no jurisdiction to make the order under *U. S. v. B. and O. R. R. Co.*, 226, U. S. 14, (Record 548), and the application was denied.

No objection to the correctness of this decision of the Commission was made by the Alabama and Vicksburg Railway Company, and the Jackson and Eastern Railroad Company acquiesced therein.

Thereupon, under Section 184 of the Constitution of Mississippi of 1890, copied *infra*, and Section 190 of the Constitution of Mississippi of 1890, copied *infra*, and under the Charter of the Jackson & Eastern Railway Company, granted by the State of Mississippi, wherein was embodied Section 4082 of the Mississippi Code of 1906, providing authority to build and operate railroad, as follows:

> "To build and construct, and thereafter to use, operate, own sell and enjoy the railroad as specified and defined in the application of the projectors for its creation and organization with one or more tracks, and to construct and operate such branches, spurs and laterals thereto as may be necessary or proper to develop the country through which its main line may extend. Upon the location of branches, spurs and laterals, the company shall file in the office of the

> secretary of state a written statement showing the line thereof, and to charge and collect reasonable compensation for the transportation of persons and property on its road."

And Section 4096 of the Mississippi Code of 1906, providing:

> "To cross, intersect, join or unite its railroad with any other railroad heretofore or hereafter constructed, at any points on their routes, and upon the ground of such other railroad company, with the necessary and proper turn-outs, sidings, switches, and other conveniences, and to exercise the right of Eminent Domain for that purpose."

The Jackson and Eastern Railway Company proceeded, under Chapter 43, Mississippi Code of 1906, on "Eminent Domain," by applying to the Eminent Domain Court, with notice to the Alabama and Vicksburg Railway Company and other named defendants, to condemn an easement over the right-of-way of the Alabama and Vicksburg Railway Company, as specified in said application, for a switch track connection at the intersection of the Jackson and Eastern Railway Company's track, as located, with the track of the Alabama and Vicksburg Railway Company, at said point. (R., 14-16.)

The application of the Jackson & Eastern Railway Company for condemnation of said switch track connection is as follows:

TO THE CIRCUIT CLERK OF RANKIN COUNTY, MISSISSIPPI:

And now comes the Jackson & Eastern Railway Company, a railroad corporation duly and legally organized under the laws of the State of Mississippi, and makes application for the exercise of eminent domain, pursuant to

Chapter 43 of the Annotated Code of 1906 of Mississippi, and of Section 4096 of said Code, and shows the following, to-wit:

1. That your applicant, the Jackson & Eastern Railway Company, was duly organized under the laws of the State of Mississippi as aforesaid, for the purpose of constructing, maintaining and operating a railroad for public use, and for the conveyance of persons and property from Union, Newton County, Mississippi, to Jackson, in the County of Hinds, and State of Mississippi, and through the Counties of Newton, Scott, Leake, Rankin and Hinds, in the State of Mississippi, and that said applicant's principal place of business is Meridian, Lauderdale County, State of Mississippi.

That the applicant has been granted, by the Interstate Commerce Commission, a certificate of public convenience and necessity, and authority to construct said railroad, as per Docket No. 9 of said Interstate Commerce Commission.

2. That in order for this applicant to construct, maintain and operate its said railroad it is necessary to connect its main line of railroad, as now surveyed and definitely located, with the main line of the Alabama & Vicksburg Railway Company, one of the defendants herein, with a switch turn-out, at a point on the main line of said Alabama & Vicksburg Railway Company, and in the manner as hereinafter described.

3. That the following real property, rights, privileges and easements are sought to be condemned, for the purposes hereinafter stated, to-wit: A strip of land of varying widths, extending from Station 0/00 on the survey enumeration of the applicant, the Jackson & Eastern Rail-

way Company, which 0/00 Station is located on the center line of the Alabama & Vicksburg Railway Company's track 1797 feet East from the first block signal semaphore East of the Alabama & Vicksburg Railway Company's bridge over Pearl River in an easterly direction along the surveyed line of the Jackson & Eastern Railway Company an average distance of 325 feet, the widths of said strip to be condemned are: At Station 0/00 16 feet, being 8 feet on each side of the center line; at Station 0/50 21 feet, being 8 feet on the right and 13 feet on the left side of the center line of the Jackson & Eastern Railway Company's survey; at Station 1/00 26 feet, being 8 feet on the right and 18 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 1/50 27 feet wide, being 9 feet on the right and 18 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 2/00 30 feet wide, being 11 feet on the right and 19 feet on the left fo the center line of the Jackson & Eastern Railway Company's survey; at Station 2/50 35 feet wide, being 15 feet on the right and 20 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 3/00 30 feet wide, being 20 feet on the right and 10 feet on the left of the center line of the Jackson & Eastern Railway Company's survey; at Station 3/25 20 feet wide, being all on the right of the center line of the Jackson & Eastern Railway Company's survey; and at Station 3/75 coming to a point on the North right-of-way line of the Alabama & Vicksburg Railway Company's said survey, containing two hundred and thirty-two thousandths (.232) acres, and lies in the NE¼ of the NW¼, Section 14, Township 5, North Range 1 East, Rankin County, Mississippi, which said center line of the proposed track of

the applicant, the Jackson & Eastern Railway Company, is more fully shown by a diagram hereto attached, marked EXHIBIT "A," and made a part hereof.

The connection which the applicant herein seeks to acquire by condemnation proceedings, with the main line of the defendant, the Alabama & Vicksburg Railway Company, is to be a No. 9 turn-out, and the use of 75 lb. rail, of the same character and design which is now in use on the main line of the Alabama & Vicksburg Railway Company at the point of connection. The said connection is to be made as shown by said diagram, EXHIBIT "A" hereto, and is to be located so that the point of the left hand frog will be 1867 feet East of the first block signal semaphore situated on the main line of the Alabama & Vicksburg Railway Company West of the Curran's Crossing and East of Pearl River; the said turn-out to operate so that cars may be interchanged between the said Alabama & Vicksburg Railway Company and this applicant, and the said turn-out to be protected by a lock, and the main line of the said Alabama & Vicksburg Railway Company to be further protected by a derail switch, which is to be placed on the rail of the applicant at a point one hundred feet beyond the point of the frog of the connecting turn-out on the North rail of the applicant's track, and the said derail switch to be kept locked open when not in use for the interchange of cars. The alignment of the Jackson & Eastern Railway Company's line adjacent to the main line of the Alabama & Vicksburg Railway Company's is as shown by the map or diagram EXHIBIT "A" hereto. The crown of the said embankment of the applicant to be not less than 16 feet wide on top, with side slopes of 1½ feet horizontal to one foot vertical. The grade of the finished Jackson & Eastern Railway

Company's track will coincide with the grade on the main line of the Alabama & Vicksburg Railway Company through the turn-out and beyond the switch ties, and continue as a 0.0 grade to Station 3/00, and from thence the grade will be a minus 0.3 of 1% for a distance of 1700 feet.

There will be 1033.3 cubic yards of earth fill in the Alabama & Vicksburg Railway Company's fill which will come within the theoretical section of the proposed fill of the applicant, and there will be 85.2 cubic yards of slag ballast now under the Alabama & Vicksburg Railway track which will come within the ballast section of the applicant's proposed connection. Ballast of stone, gravel or slag will be placed 1½ feet deep below the top of the cross-ties of the Jackson & Eastern Railway's track throughout that portion where drainage of the Alabama & Vicksburg Railway Company's track shall be affected by earth ballast, namely, from Station 0/00 to Station 2/00, on the Jackson & Eastern Railway Company's survey enumeration.

The switch ties to be used in the turn-out will be of White or Post Oak, of first class grade, and 7″x9″ cross section. The installation to be made under competent supervision, and a workmanlike manner, in accordance with the standard practice of the A. & V. Railway Company.

The applicant further shows that the lands, easements, rights and privileges above described are owned by the defendant, the Alabama & Vicksburg Railway Company, a corporation organized under the laws of the State of Mississippi, and owning and operating a line of railroad, as a common carrier, from Meridian, Mississippi, to Vicksburg, Mississippi, which line of railroad extends through Rankin County, Mississippi.

Applicant further shows that the defendant, the Canal Commercial Trust & Savings Bank, is a corporation organized under the laws of the State of Louisiana, and domiciled and doing business in New Orleans, Louisiana, and that its postoffice address is New Orleans, La.; and that the defendant, Felix E. Gunter, is a non-resident of the State of Mississippi, that he is a resident of the State of Louisiana, and that his postoffice address is New Orleans, La., c/o Canal Commercial Trust & Savings Bank; that the said Canal Commercial Trust & Savings Bank and Felix E. Gunter are named as Trustees in that certain mortgage or deed of trust executed by the said defendant, the Alabama & Vicksburg Railway Company, on March 23, 1921, to secure the First Motgage Bonds issued by the said Alabama & Vicksburg Railway Company on April 1, 1921, for $4,000,000.00, which said deed of trust or mortgage conveys to said Trustees, to secure said bonds, the property, rights, privileges and easements herein sought to be condemned.

This applicant further states and shows that the said First Mortgage Bonds issued by the defendant, the Alabama & Vicksburg Railway Company, dated April 1, 1921, are now owned by various corporations, whose names and postoffice addresses are unknown to this applicant.

4. Your applicant would further show that the public use for which the strip of land, rights, privileges and easements hereinabove described, is for a right-of-way for a switch track and the connection of said switch with the main line of the defendant, the Alabama & Vicksburg Railway Company at the point above described; and your applicant further shows that it is necessary for it to own, occupy and use said strip of land, rights, privileges and

easements above described, in order properly to conduct its business as a common carrier, for which purpose it was organized.

5. That your applicant has been, and still is, unable to agree with the defendants herein as to the compensation to be paid to them, and that the defendant, the Alabama & Vicksburg Railway Company has refused and declined to permit this applicant to connect with its main line in the manner as herein described, and that your applicant has not been able to obtain from the defendants the right, privileges and easements herein sought to be condemned.

6. Your applicant further shows that it is its intention, in good faith, to make the connection with the main line of the said Alabama & Vicksburg Railway Company in the manner and at the point herein described.

WHEREFORE, your applicant prays that such steps be taken for the condemnation of said lands, rights, privileges and easements, for the purposes aforesaid, as are required by Chapter 43 and Section 4096 of the Annotated Code of 1906 of Mississippi.

And as in duty bound your applicant will ever pray.

JACKSON & EASTERN RAILWAY CO.
APPLICANT.

Thereupon, the Alabama and Vicksburg Railway Company, with its Trustees for bondholders filed a Bill in the Chancery Court of Lauderdale County, Mississippi, (Record 1-13), to enjoin the condemnation proceedings, and a preliminary injunction was granted. (Record 17.)

The gravamen of the Bill of Complaint is, (a) That

the right-of-way and road bed sought to be condemned is the "private property" of the Alabama and Vicksburg Railway Company, not subject to condemnation by Eminent Domain proceedings, (Record 2), and that the Eminent Domain statutes, if construed to justify condemnation proceedings of this "private property", violated the State Constitution and the 14th Amendment to the Federal Constitution.

The bill avers that under said Section 4096, railroad companies shall have the right to cross, intersect, join or unite its road with any other road heretofore or hereafter constructed at any point on their route, and upon the ground of any other railroad company, with proper turnouts, sidings, switches, and other conveniences, and to exercise the right of Eminent Domain for that purpose, (R. 4), and after reciting said Section 4096, the Bill avers that:

> "The complainants do not and will not object to the defendant being given all the right it may have under its charter as granted by Mississippi Code of 1906, Section 4096, at a proper and reasonably safe place for the junction or uniting of the two railroads, but as will be shown hereafter the point of the junction sought by the defendant in its Eminent Domain proceedings is an entirely improper and eminently dangerous one for the junction or uniting of two railroads. (Complainants are advised and insist that said Code, Section 4096, does not confer authority on defendant to condemn complainant's right-of-way longitudinally or give defendant the benefit or use of complainant's track facilities) (Record 4-5), x x x "Complainants recognize the defendant's rights under Section 184 of the State Constitution, and as hereinbefore stated, will not object to an intersection or connection of the two railroads, if made at a suitable

and not dangerous place. The Complainant, Alabama and Vicksburg Railway Company, will be ready and willing when a connection or intersection is made of its road with defendant's road, to receive and transport defendant's passengers, tonnage and cars, loaded or empty, without unnecessary delay or discrimination, upon payment by the defendant, to the Alabama and Vicksburg Railway Company of just and reasonable compensation for such services as the latter company may render in so doing."

The Bill then avers that the point of the proposed junction was not a suitable and proper place; and, further avers, (Record, p 12), that the exclusive right to compel connections and the use of the terminal facilities and other property by and between railroads engaged in interstate commerce, is vested, by Section 3, Paragraph 14, of the Interstate Commerce Act, as amended by the Transportation Act, in the Interstate Commerce Commission which has exclusive jurisdiction of the proposed switch connection.

The Bill was demurred to, (Record 18), because it does not show that complainants are entitled to relief prayed for, or to any relief, and no equity shown, and a motion was made to dissolve the preliminary injunction because the Bill does not entitle complainants to the injunction, and that it was improvidently made, and there is no Equity in complainant's Bill.

This motion and demurrer were heard by the Chancellor, the demurrer was sustained, and the injunction dissolved, and an appeal was taken to the Supreme Court from the decree sustaining the demurrer, and upon appeal, the Supreme Court held, (Record, p. 28), that the Bill did not entitle to an injunction, except upon this proposition (Record p. 35), that:

"The right to make a physical connection by one railroad with that of another must be reasonably exercised. In other words, the point of junction must be selected with due care with reference to the interest and welfare of both railroads, and with reasonable consideration for safety and other rights of the general public, as well as the two railroad companies. Under the facts alleged in the Bill, as above set out, we think the complainant had a right to resort to a Court of Equity to have this question determined, as it could not raise the question in the Eminent Domain proceedings, as has been decided by this court in the case of *Vinegar Bend Lumber Company v. Oak Grove and G. R. Co.* 89 Miss. 84; 43 Southern, 292. In other words, in this case, the Court construed the Statute of Eminent Domain and adjudicated that the only question that could be decided in that proceeding was the amount of damages. That the Court could not decide the right of the plaintiff in such proceedings to institute the proceedings, nor could any other question be raised than that of the amount of damages, and that the circuit court on appeal from the judgment of the eminent domain court had no greater right or jurisdiction than the eminent domain court had. It was also decided that equity had jurisdiction and that it was the court of exclusive jurisdiction in all other cases than the assessment of damages.

"We think it certainly could not be that one railroad company can alone select a place of junction regardless of circumstances or conditions. It has the right to intersect such railroad or cross it whenever the conditions are such that it may do so without endangering unduly the public safety, or the rights or interests of the other railroad company considered with reference to the feasibility of the proper junction at a more reasonable point, having due regard

to the circumstances, the interests of the two railroads, and that of the general public." (R. 35.)

Thereupon, for these reasons, the decree dissolving the injunction was reversed, and the case remanded to be proceeded with in the Chancery Court.

After the Supreme Court delivered this opinion, a Suggestion of Error was filed by the Jackson and Eastern Railroad Company, (Record 36-52), which was overruled.

Upon remand to the Chancery Court, the Bill was answered, and a large amount of testimony, *pro* and *con,* was taken to establish whether the proposed junction at the point named in the application for condemnation was a reasonably safe place for a junction, or, whether, as contended for by the Alabama and Vicksburg Railway Company and some of its witnesses, there was a proper place about two and one-half miles east of the place named in the application for condemnation, and much conflicting evidence was introduced, under the rule prescribed by the opinion of the Supreme Court.

This was upon a question of fact only, namely, the reasonableness of the place for the junction for the proposed switch connection.

The Chancellor, upon hearing the witnesses orally, and upon a personal examination of the premises, held that the place named in the application was a safe place for the junction, and dissolved the injunction.

The Alabama and Vicksburg Railway Company appealed to the State Supreme Court, and this decree of the Chancellor, *on the facts,* was affirmed, and, in response to the contention by the Alabama and Vicksburg Railway Company that the application for condemnation sought

to condemn the fee simple title in the property of the Alabama and Vicksburg Railway Company, the Supreme Court (Record 677-680) construed the whole of the language of the application, and held (R. 680) that:

> "Under the law an easement is all that could be secured by the condemnation proceedings; and we think that was all that was intended to be condemned, and the judgment of the condemnation must necessarily be limited to the acquirement only of an easement for the proposed connection. Therefore, we hold that the application, when properly construed, seeks on (only) an easement which the appellee, Jackson and Eastern Railway Company is entitled to under the law."

Thus, the Supreme Court construed the pleading shown by the application to call for *an easement* only, and not a fee, and that the judgment of condemnation, under the Eminent Domain Statute, prescribed by Section 1867, Code of 1906, wherein the form of the judgment is set forth, would only be for an easement, and thus the Mississippi Supreme Court has construed the pleading, and interpreted the pleading under this Mississippi Statute, and this interpretation will be followed by this Court.

The Constitution of Mississippi, 1890, provides:

> "Section 190. The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use; and the exercise of the police powers of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or general well-being of the state."

Section 184, Constitution of 1890, p. 87, Miss. Code of 1906, provides:

> "All railroads which carry persons or property for hire shall be public highways and all railroad companies so engaged shall be common carriers. Any company organized for that purpose under the laws of the state shall have the right to construct and operate a railroad between any points within this State, and to connect at the state line with roads of other states. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and all railroad companies shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without unnecessary delay or discrimination."

Chapter 43 of the Code of 1906 of Mississippi on Eminent Domain, by Sections 1854, 1855, 1856, 1857, 1858, 1859, 1862, 1863, 1864, 1865, 1866, 1867 and 1871, provides:

> "1854. Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter, and not otherwise, except as specified in the chapter on 'landings,' 'mills and milldams,' and 'roads, ferries and bridges'."

> "1855. A special court of eminent domain is created to consist of a justice of the peace and a jury which shall have and exercise the jurisdiction and powers herein enumerated."

> "1856. How court organized, etc.—When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor in writing, and the owners of the property sought to be condemned and mortgagees, trustees, or other persons having an interest therein or a lien thereon, shall be made de-

fendants thereto, which shall state with certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the clerk of the circuit court of the county, who shall indorse thereon his appointment of a competent justice of the peace of the county in which the property, or some part thereof, is situated, to constitute, with a jury, the special court of eminent domain; and he shall fix the time and place in the county for the organization thereof."

"1857. (1682) The same; further duties of the circuit clerk.—The circuit clerk shall issue a summons directed to the sheriff of the county, commanding him to summon the defendants and the justice of the peace designated by him to be and appear at the time and place named; the justice to preside over the special court and the defendants to protect their rights as against the applicant; and the clerk shall, in the presence of the clerk of the chancery court and the sheriff, who are required to attend, draw from the jury box of the circuit court of the county the names of eighteen jurors to serve as such in the special court; and the clerk shall issue a venire facias to the sheriff, commanding him to summon the jurors as drawn to appear at the time and place designated. (See Par. 2719.)"

"1858. (1683) Justices and jurors to assemble, etc.—The sheriff shall execute the said summons and venire facias, and make due return thereof to the justice, at the time and place fixed, and the justice and jurors so summoned shall attend at such time and place; and then and there the application, with the clerk's indorsements thereon, showing his acts in the premises, shall be filed; and the sheriff shall return and file the process issued to him, with indorsements showing how he shall have executed the same;

and he shall also file an alphabetical list of the jurors drawn and summoned."

"1859. (1684) Record to be kept; sheriff to attend.—The justice of the peace shall keep, in writing, a complete record of all the court's proceedings. The sheriff, by himself or deputy, shall attend the court and execute its process."

Section 1862 of the Code of 1906 of Mississippi regulates the organization of the jury, and Section 1863 provides the oath to be taken by the jurors. Section 1864 of the Code of 1906 of Mississippi is as follows:

"1864. (1869) Evidence may be introduced, etc.—Evidence may be introduced by either party before the jury, under the direction of the justice, and the jury shall, unless the parties consent to the contrary, go to the premises, under the charge of the justice and the sheriff, and view the property sought to be condemned and its surroundings, and may examine and measure the same, after which, either party may, by himself or counsel, or both, argue the cause."

Section 1865 prescribes the instruction to be given by the presiding justice:

"1865. (1690) The Justice's Instruction.—The justice shall instruct the jury, in writing, in the following words: 'The defendant is entitled to recover damage in this cause, and it devolves on you honestly and impartially to estimate the sum thereof, according to the evidence adduced on the trial, the weight and credibility of which you are the sole judges. The defendant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom any thing on account of the supposed

benefits incident to the public use for which the application is made.' The instruction shall be signed by the justice, be filed, and become a part of the record."

Section 1866 prescribes the form of the verdict of the jury, and Section 1867 prescribes the form of the judgment.

Section 1871 of Chapter 43 of the Code of 1906 of Mississippi is as follows:

> "1871. (1696) Appeals.—Every party shall have the right to appeal to the circuit court from the finding of the jury in the special court by executing a bond with sufficient sureties, payable to his adversary, in a penalty of three hundred dollars, conditioned to pay all costs that may be adjudged against him, which bond shall be given within twenty days after the rendition of the verdict, and may be approved by the justice. If the appeal be by the defendant, it shall not operate as a supersedeas, nor shall the right of the applicant to enter in and upon the land of the defendant and to appropriate the same to the public use be delayed. Upon appeals, the issues shall be tried de novo in the circuit court, which shall try and dispose of it as other issues, and enter all proper judgments."

Plaintiff in Error sued out a writ of error from this Court to the Supreme Court of Mississippi to reverse this decision, the writ being granted to and by the Chief Justice of that Court. (R. 691, 698).

After the record was filed in this Court plaintiff in error petitioned this Court for a writ of certiorari, which was heard on briefs and its consideration postponed until the merits were heard.

BRIEF.

POINT 1.

This writ of error should be dismissed, and the petition for certiorari should be denied, because there is no Federal question involved, in that,

(a) The only State Statutes challenged are those arising under Sections 184 and 190, Const. Miss. 1890, and Chapter 43, Miss. Code of 1906 on "Eminent Domain," and Chapter 118, Code of 1906, giving railroads the right to join switch tracks under Eminent Domain proceedings, and as being contrary to the powers of the Interstate Commerce Commission under the Transportation Act of 1920, and the 14th Amendment. It is settled by the decisions of this Court that the power of Eminent Domain is a non-delegable police power of the sovereign State, and that it extends to railroad switch tracks of railroads engaged in interstate commerce. *Georgia v. Chattanooga*, 264 U. S. 472, 68 L. Ed. 796; *West & Atl. R. R. Co. v. Ga. Pub. Serv. Com.* 267 U. S. 493, 69 L. Ed. 753. See particularly *State ex rel. v. Seaboard Air Line*, 104 So. (Fla.) 602.

(b) The property of a railroad company can be subjected to the eminent domain power of the State. Cases *supra.*

The Bill expressly avers that under the Constitution and Statutes of the State of Mississippi the proposed switch connection can be made, that no objection by the Alabama and Vicksburg Railway Company was or would be made to the connection at a proper point, but averring that the proposed point of junction was an improper place —thus, on the face of the bill, the Alabama and Vicksburg

Railway Company admits that if the proposed place of junction is a proper place, that the Jackson and Eastern has a right to make a switch connection at that point, and that the Alabama and Vicksburg Railway Company has no objection to make thereto.

Thus the crux of the objection is as to the place—a question of fact—and no Federal question could arise where the right was conceded to do the act under the State Statutes at the proper place; and the Court directed a hearing on the evidence and a finding on this question, and this was done; and this is the finding now here complained of.

(c) The Jackson & Eastern, before commencing this Eminent Domain proceedings, made application to the Interstate Commerce Commission to order this *switch* connection, and the Commission ruled that, under the decision of this Court, in *U. S. v. B. & O. S. W. R. R.* 226, U. S. 14, construing paragraph 9 of Section 1 of the Transportation Act, it had no jurisdiction to make an order as to *switch* tracks.

No complaint of this order of the Commission was made by the Alabama & Vicksburg Railway Company, and it was acquiesced in by the Jackson & Eastern, and the denial by the Interstate Commerce Commission of jurisdiction, and the failure of the Alabama & Vicksburg Railway Company, to complain of this order, now precludes the Alabama & Vicksburg Railway Company from contending, in the State courts, that the Interstate Commerce Commission had exclusive jurisdiction under the Transportation Act of 1920.

(d) The proceeding to condemn an easement for the building of a switch track between two domestic corporations, state carriers, under the statutes of the state, does

not come within the jurisdiction of the Interstate Commerce Commission under the Transportation Act. *U. S. v. B. & O. & S. W. R. R. Co.*, 226, U. S. 14; *West. & Atl. R. R. Co. v. Ga. Pub. Serv. Com.* 267, U. S. 493, *supra*, where, on page 497, the Court says:

> "It seems to be the contention of the company that since 85 per cent of the business done on the sidetrack is interstate commerce, the power to order its establishment or abandonment is vested in the Interstate Commerce Commission and that the State Commission is without authority in the premises. Such a claim is in the teeth of the Transportation Act of February 28, 1920, 41 Stat. at L. 456, Chap. 91, Sec. 402, P. 22, Comp. Stat. Sec. 8563, Fed. Stat. Ann. Supp. 1920, p 96, which provides that the authority of the commission cenferred by Sec. 402 over the extension or the abandonment of interstate railway lines shall not extend to the construction of spur, industrial or side tracks."

(e) The construction of the pleading as to the issues raised, and as to the proper judgment to be rendered thereon, under the State Statute, Section 1867, Code of 1906, will be followed by this Court. *Farncomb v. Denver*, 252 U. S. 764, and, hence, the interpretation by the Supreme Court that an easement is all that the pleadings called for and for which judgment in the eminent Domain Court, under the statute, could be awarded, will be followed by this Court.

(f) The attack must be upon the invalidity of the statute and not upon the opinion of the Supreme Court. *Live Oak Water Users Association v. Railroad Commission*, U. S. Sup. Ct. Advance opinion, 1925-6, page 176:

> (g) "Where the State Court has decided a local question adequate to support its judgment, this court

Before the filing of the condemnation proceedings the Jackson & Eastern Railway Company filed an application to the Interstate Commerce Commission praying for an order directing and requiring physical connection on the part of the applicant with the Alabama & Vicksburg Railway Company at a point east of Pearl River, and also directing and requiring the Alabama & Vicksburg Railway Company to grant the applicant the right to use that portion of the main line of the Alabama & Vicksburg Railway Company between said point of connection and a point in the City of Jackson. This application was filed with the Interstate Commerce Commission on December 10th, 1921. (Record 597-599.)

On February 7th, 1922, the Secretary of the Interstate Commerce Commission wrote to the attorneys for the Jackson & Eastern Railway Company with reference to the above application from which this language appears:

> "Your complaint has been considered by the Commission, and I am directed to call your attention to the decision of the Supreme Court of the United States in *U. S. v. B. & O. S. W. Railroad*, 226, U. S. 14, wherein the Court construes paragraph 9 of Section 1." (Record 547-549.)

After quoting from the opinion of this Court in the above styled cause the Secretary of the Interstate Commerce Commission stated:

> "Upon this statement of facts the Commission would apparently have no jurisdiction to grant the relief prayed for. Under all circumstances the Commission has thought best to bring the above facts and statements of law to your attention in order that your company might be fully advised as to the Commission's lack of power to grant the relief prayed

for, and so as to enable you, if so desired, to make such other arrangements for the construction or operation of the road as might appear to be desirable. Under the circumstances above outlined it is assumed that you will request the Commission to dismiss the complaint without prejudice."

Subsequent to the receipt of this letter, the eminent domain proceedings were instituted. There was never any hearing on the application made to the Interstate Commerce Commission and it was finally dismissed.

The attorneys for the plaintiffs in error and petitioners in their brief filed in this Court make no reference to the Act of June 18th, 1910, Chapter 307, Section 7, 26 Statutes at Large, 539, but contend that Section Three (3), Paragraphs Three (3) and Four (4) of the Transportation Act of 1920 vested in the Interstate Commerce Commission exclusive jurisdiction of track connections between interstate carriers. These sections are as follows:

"(3) All carriers engaged in the transportation of passengers or property subject to the provisions of this Act, shall according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares and charges between such connecting lines or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

"(4) If the Commission finds it to be to the public interest and to be practicable without substantially impairing the ability of a carrier owning or en-

titled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal of any carrier or carriers on such terms and for such compensation as carriers affected may agree upon, or in the event of a failure to agree, as the Commission may fix, as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

Before examining the cases cited in support of this contention it might be well to refer to some of the principles announced by this Court affecting the question now under discussion. This Court in the case of *Missouri K. & T. R. R. Co. vs. Harris*, 234 U. S. 411, 58 Lawyer's Edition, 1378, said:

"These cases recognize the established rule that a state law enacted under any of the reserved powers—especially (419) if under the police power—is not to be set aside as inconsistent with an Act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded. In *Reid v. Colorado*, 187, U. S. 137, 148, 47 Law. Ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, the court, speaking by Mr. Justice Harlan, said: 'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the

exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot v. Davenport*, 22 How. 227, 243, 17 L. Ed. 243, 247,' In *Savage v. Jones*, 225 U. S. 501, 533, 56 L. Ed. 1182, 1194, 32 Sup. Ct. Rep. 715, the court said: 'When the question is whether a Federal act over-rides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect, the state law must yield to the regulation of Congress within the sphere of its delegated power (citing cases). But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal Legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the State.' "

The same principle is announced by this Court in the case of *Reid v. Colorado*, 187, U. S. 138, 47 Lawyers' Edition 110, *Savage v. Jones*, 225 U. S. 503, 56 Lawyers' Edition 1183, *Sinnot v. Davenport*, 22 How. U. S. 227, 16 Lawyers' Ed. 254.

The following provision found in Section 17, Section 402 of the Transportation Act of 1920 shows that it was not the intent of Congress to supersede the exercise by the state of its police power in the matter involved in this case, to-wit:

> . . . it cannot be surrendered, and if attempted to be contracted away, it may be resumed at will . . . it is superior to the property rights . . . and extends to all property within the jurisdiction of the state, . . . to lands devoted to railroad use."

We also refer the Court to the case of *Grand Trunk Railway Company v. Michigan Railroad Company*, 231 U. S. 457, 58 Lawyers' Edition 311.

In the case of *Missouri P. R. Company v. Larabee Flour Mills*, 221 U. S. 613, 53 Lawyers' Edition 352, this Court said:

> "Congress could always regulate interstate commerce, and could make specific provisions in reference therto, and yet this has not been held to interfere with the power of the state in these incidental matters. A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the authority of the state. It is not contended that the Commission has taken any action in respect to the particular matters involved. It may never do so, and no one can, in advance, anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce, and a delegation of that control to a commission, necessarily withdraws from the state all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific

> action by Congress or the Commission, the control of the state over these incidental matters remains undisturbed."

The cases mainly relied on by the plaintiffs in error and petitioners are: *Lake Erie A. & W. Railroad Company v. Public Utilities Commission*, 141 Northeastern 847; *People ex. rel. New York C. R. R. Co. v. Public Service Commission*, 233, N. Y. 113, 135 Northeastern 195.

In the case of *Lake Erie A. & W. Railroad Company v. Public Utilities Commission, supra*, the Interstate Commerce Commission assumed jurisdiction which was first invoked by the railroad company, and the Interstate Commerce Commission, after a full hearing denied the application upon grounds affecting both inter and intrastate commerce. In this material respect this case differs from the case at bar. The Interstate Commerce Commission in the case cited assumed and exercised jurisdiction. That the Supreme Court of Ohio regarded this fact as controlling is evident from the following statement contained in its opinion:

> "We are confronted with the situation, where a jurisdiction voluntarily invoked having been exercised, its effect cannot be denied."

The case of *People ex. rel. in New York C. R. Company v. Public Service Commission, supra*, involved the authority of the State Commission under Section 35, Public Service Law (Consol.) Chapter 487, amended by Chapter 637, Laws of 1920, of the State of New York. Subdivision "D" of this Act provides that:

> "Every common carrier as such, is required to receive from every other common carrier, *at a connecting point* freight cars of proper standard," etc.

The order of the Public Service Commission involved in this case required the New York Central Railroad Company and the Lehigh Railroad Company to make track connections between their main lines in the City of Batavia. The main lines of these two railroads were from one-half to one mile apart in the City of Batavia.

The Court of Appeals of New York in its opinion in this case said:

> "The City of Batavia is not a connecting point between the two roads; each road maintains its separate freight and passenger stations. . . . The order of the Commission requires track connections to be laid and maintained by the two roads in the City of Batavia, to permit interchange of freight destined for consignees in said City or to be shipped therefrom, and tariff schedules to be filed for service to be rendered in such inter-change. The amendment of the Act of 1920 was ineffectual to enlarge the powers of the Public Service Commission."

After deciding that the state law did not grant to the Public Service Commission the power to force a connection of the two railroads so situated at Batavia, the judge who wrote the opinion proceeded to discuss the effect of the Federal Transportation Act of 1920. One of the judges concurred on the first ground stated in the opinion; that is, the lack of authority on the part of the Public Service Commission under the state law to compel a connection at a place which was not a "connecting point." We call the Court's attention to the fact that the Court of Appeals of New York in this case did not refer to Paragraph 17, Section 402, of the Transportation Act. Evidently its attention was not called to this part of the Transportation Act of 1920. The principles announced in the opin-

ion touching the effect of the Transportation Act of 1920, we submit, were not in harmony with the principles announced by this Court in numerous cases heretofore cited by us.

At the end of the opinion of the Court on page 1077, 22 A. L. R., it is stated that a petition for a writ of certiorari was denied by the Supreme Court of the United States, March 13th, 1922. The publishers of the American Law Reports have notified us that this was an error.

The remaining cases discussed in the brief on behalf of plaintiffs in error and petitioners under the head of

"Issue No. 1" involve matters which have been clearly committed by Congress to the exclusive jurisdiction of the Interstate Commerce Commission, and we submit that the principles announced in these cases do not conflict with the principles for which we contend in this case.

PLAINTIFFS' "ISSUE NO. 2," BRIEF P. 35.

The contention here is that the condemnation statutes of Mississippi are in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, because the application for condemnation failed to declare clearly the precise property and the precise interest therein sought to be condemned. We have set out in this brief the state statutes under which the condemnation proceedings were instituted. In view of the fact that this Court has so often decided that the condemnation proceedings under similar statutes were not in violation of the Constitution of the United States, we do not think it necessary to enter into any lengthy discussion of this contention.

"Necessity for taking.—In condemnation proceed-

ings there is no fundamental right secured by this clause to have the questions of compensation and necessity both passed upon by one and the same jury. In many States the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the legislature or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of judicial character, but rather one for determination by the lawmaking branch of the Government. Constitution of the United States, Revised and Annotated (1924), p. 690.

"*Backus v. Union Depot Co.*, 169 U. S. 568; *Sears v. Akron*, 246 U. S. 242; *Bragg v. Weaver*, 251 U. S. 57; *Rindge Co. v. Los Angles*, 262 U. S. 700; *Milheim v. Moffat*, 272 U. S. 710."

"Mode of assessing compensation.—In condemnation proceedings there is due process of law when provision is made for an inquiry as to the amount of compensation in some appropriate way before some properly constituted tribunal. It is within the power of the State to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way, or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common law, without the presence of a trial judge." *Backus v. Union Depot Co.*, 168 U. S. 569; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 694. Constitution of United State, Revised and Annotated (1924) p. 691.

With reference to the contention that the application for condemnation failed to declare clearly the precise property and the precise interest therein sought to be condemned, the plaintiffs in error and petitioners in their

brief do not set out the entire application, but only certain parts which they have separated from the context. A complete answer to this contention is a reading of the entire application which we have copied in the first part of this brief. The Supreme Court of Mississippi has construed this application in this case in 101 So. 533. It held that only an easement was sought to be condemned by the Jackson & Eastern Railway Company in the condemnation proceedings. The Court said:

> "Under the law an easement is all that could be secured by the condemnation proceedings; and we think that was all that was intended to be condemned, and the judgment of condemnation must necessarily be limited to the acquirement only of an easement for the proposed connection. Therefore we hold that the application, when properly construed, seeks only an easement which the appellee, Jackson & Eastern Railway Company, is entitled to under the law."

This is the construction of the pleadings by the State Court in deciding the issue involved, and this Court accepts the decision of the State Court in its construction of the pleadings under state practice and of the effect of the State Statute providing for judgment on such pleading. *Farncomb v. Denver*, 252 U. S. 6. Under the interpretation of Chapter 43, Code of 1906 on Eminent Domain by the State Supreme Court in the Vinegar Bend case cited and relied on in this case, every legal question arising in or defense to a proceeding before an Eminent Domain Court, other than the amount of damages for the taking, can be and should be determined by a proceeding to enjoin in the Chancery Court. That practice was followed here. When the Eminent Domain proceeding was filed, the Alabama and Vicksburg Railway Company, plaintiff in error, conceiving that it had defenses to the

proposed taking other than the ascertainment of damages, filed this bill in the Chancery Court to enjoin the Eminent Domain proceedings, not as to its power to ascertain damages, but as to its power under the defenses set up in the bill to act at all. All these defenses were set up, and the court having found that the defenses were not good, the injunction was dissolved and the Eminent Domain proceedings ordered to proceed to ascertain the damages for the easement so to be condemned. Thus, the plaintiff in error had every opportunity to be heard and was heard, and this was due process of law within the 14th Amendment.

A reading of the application for the Eminent Domain proceedings will show that the Jackson and Eastern Railway Company sought to acquire only an easement for a switch connection. All of the contentions made by plaintiffs in error were decided against them by this Court in the case of *Louisville & Nashville R. R. Company v. Western Union Telegraph Company*, 170, Miss. 626, 250 U. S. 363, 73 L. Ed. 1032.

PLAINTIFFS' "ISSUE NO. 3," BRIEF P. 42.

The contention here is based on the assumption that the Jackson & Eastern Railway Company sought to acquire in the condemnation proceedings a portion of the main line of the Alabama & Vicksburg Railway Company. We have already seen that no such right was sought to be condemned, and that the Supreme Court of Mississippi has held that the Jackson & Eastern Railway Company sought only an easement, that is, a switch connection. Of course, it is not contended that the Jackson & Eastern had any authority under the laws of Mississippi to acquire any part of the main line of the Alabama & Vicks-

burg Railway Company, or to acquire any right to use its main line. Therefore, the cases cited under issue number three are not pertinent to any real issue in this case, and we will not take up the time of the Court in discussing them.

PLAINTIFFS' "ISSUE NO. 4," BRIEF P. 69.

The main case relied on by the plaintiffs in error is *Lancaster v. G. C. & S. F. R. R. Co.*, 298 Fed. 488. This case was reversed and bill dismissed by the Circuit Court of Appeals for the Fifth Circuit in the case of *Gulf C. & S. F. Ry. Co. v. Texas & P. Railway Co.*, Fed. Rep. Second Series, Vol. 4, page 904.

The issue here propounded is not found in the bill and is without support in law or in fact. The bill made the application for condemnation an exhibit to it, (R. p. 14) and it specifically described the place of the proposed junction which later, generally, is called Curran's Crossing being near the place of the highway crossing and being a suburb of the City of Jackson. The bill, with the place of junction thus specifically set forth, avers that it is not a safe place for a junction, and that no objection was or would be made by the Alabama & Vicksburg Railway Company to a connection if made at a proper place (R. pp. 4, 5, 6). There is no averment in the bill that the certificate of public necessity, or other prerequisite to construction at the point named by the Interstate Commerce Commission, is not given. On the contrary, the bill avers at length the improper and dangerous place proposed for connection (R. pp. 8 to 12), and the crux of the bill is that the place designated in the application is an unsafe and dangerous place. The bill avers that

(page 10) "the proposed junction is near the suburbs of the City of Jackson."

The testimony for the Alabama & Vicksburg Railway Company is directed to the proposition that the proper place for the junction was at a point some distance east of Curran's Crossing and much farther away from Jackson than the proposed point of junction and a point some distance off the direct line between the termini of the Jackson & Eastern Railway Company as described in the application filed with the Interstate Commerce Commission for a certificate of convenience and necessity. Plaintiffs in error had a survey and map made (R. 353-402) to show that the point of the junction which they proposed was a proper place and should be the point selected for the junction, and not the point near Curran's Crossing; and thus the inconsistency of having tried the case on the proposition that the place for the junction designated by Durham and Hayden about six miles east of Jackson was a proper place to make the junction, and then now to insist, in this Court, that the junction could not be made at Curran's Crossing because the Interstate Commerce Commission had not ordered that place to be the point of junction, although this point was a suburb of the City of Jackson (see Durham's testimony, R. 402; Hayden's, R. 353). As shown, *supra*, the Interstate Commerce Commission has no jurisdiction in respect to switch tracks, and when the proposed switch track was submitted to the Interstate Commerce Commission, it held that it had no jurisdiction in respect to switch tracks between independent interstate railroads, but nowhere suggested that the place of the proposed switch, as a matter of fact, was not authorized by the certificate of public necessity; nor did the Alabama & Vicksburg Railway Company, which was notified of the

application to the Interstate Commerce Commision, ever suggest to the Interstate Commerce Commission that the proposed junction at Curran's Crossing was not within the clause of the authority to construct. The authority to construct was to the City of Jackson, and here in process of construction this interchange switch connection is desired at a point near to the City of Jackson and at a point which proper and judicious operation would require. To establish interchange switch track yards outside the City would not show that the railroad was not to be built to the City of Jackson. It is common knowledge that this is very common practice in railroading.

PLAINTIFFS' "ISSUE NO. 5," BRIEF P. 75.

In the last analysis plaintiffs in error contend that their constitutional rights are denied them in that the state courts are undertaking to impose upon them as an important interstate carrier, conditions that are eminently dangerous to the life and limb of their employees and passengers. This contention is predicated upon their alleged five (5) points of danger. See page 2 of their brief, under summary of facts.

It will be remembered that plaintiffs in error selected the forum for the trial of these issues of fact; and the forum thus selected by them tried the issues upon proof offered, and found against the contention of plaintiffs in error touching each and all of the alleged grounds of danger. An appeal was taken by them from this finding of fact to the Supreme Court of the State of Mississippi, where the decree of the Chancellor was affirmed. So far as the alleged grounds of danger are concerned, they present purely a question of fact, and we respectfully submit that an affirmance by the highest court of the state of

the Chancellor's finding of fact is final and binding on plaintiffs in error. We would submit this point in the case without further comment but for the oft repeated insistence of plaintiffs in error that the place selected is eminently dangerous, despite the contrary finding of fact by the state courts, but we submit with confidence that the finding of fact by the courts on the five (5) points of alleged danger is a proper finding and one warranted by the evidence offered in the case.

Many witnesses were heard for each side and the testimony is in much conflict. Plaintiffs in error introduced nine (9) or ten (10) witnesses, and some of them were men of broad experience in railroad matters, but with such witnesses the probative value of their testimony depends upon their accurate and full knowledge of the facts involved in the particular controversy, and under this observation we desire to make comment upon their testimony.

I. Touching the alleged dangers arising from flood waters.

To determine what effect, if any, the road bed of this defendant in error, would have upon the bridge and main line of the Alabama & Vicksburg Railway Company one must necessarily know the contemplated height of the defendant's fill and the number, location and size of the openings through it for water passage. The proposition appears self-evident to us, and we submit that it finds support in the testimony of Mr. Stamm, the Superintendent of the Alabama & Vicksburg Railway Company and the Vicksburg, Shreveport & Pacific Railway Company, a witness on behalf of the plantiffs in error. We quote from the printed record on pages 158 and 159:

"Q. Mr. Stamm, you testified about this water backing up and about the effect the building of the Jackson & Eastern embankment would have on the water. Do you know how many openings or conduits for water to pass through are planned in this Jackson & Eastern embankment?

"A. I don't know what is planned, but I know how many openings there is in the bank so far as I can see.

"Q. The bank is built only a little ways?

"A. Yes, sir.

"Q. Now, of course the effect that the Jackson & Eastern embankment would have on the water would depend on the number of openings in the embankment.

"A. And the height of the embankment.

"Q. You don't know how high the bank is going to be after it goes away from the Alabama & Vicksburg right-of-way?

"A. No, sir."

In proof of the dangers from over-flow water paintiffs in error used nine (9) witnesses, and out of the nine (9) only three (3) of them—E. Ford, W. W. Hayden and E. M. Durham—had any knowledge either of the contemplated height of the defendant's fill or of the openings to be left through it for water passage. And not one of the above three (3) witnesses named predicated his opinion of danger upon either the height of the fill or the number, location, or size of the openings. This is true notwithstanding the fact that defendant's witnesses, Duffee and Stacker, both civil engineers, fully disclosed in their testimony the height of the dump and the number, location

and size of the openings to be left to care for water in case of over-flow. It is especially noticeable that Mr. L. A. Jones, President of the Alabama & Vicksburg Railway Company, was called by plaintiffs in error as a witness in rebuttal, after defendant's proof was all in the record and no question was propounded to him touching either the sufficiency or insufficiency of the openings, or touching the reasonableness or unreasonableness of the height of the defendant's contemplated dump, or fill. We submit that plaintiffs' superintendent, Mr. Stamm, was correct when he testified that a knowledge of the height of the fill and a knowledge of the openings through it were necessary in order for a witness to know the effect, if any, of flood waters on the Alabama & Vicksburg Railway Company's property. We therefore submit that the testimony of the witnesses for plaintiffs in error has little probative value touching this point.

The witnesses offered by defendant in error knew these facts. They made the calculations and determined the facts while seeking, as engineers, a basis of safety for both railroads, and it is therefore, not a surprise to us that the Chancellor who heard this testimony and who visited the scene and made personal observation on the ground, found this issue of fact against the appellants in error.

II. Other alleged grounds of danger.

Under this head we shall discuss the other four grounds of alleged danger together as the observations we desire to make are common to all of them.

The alleged grounds of danger are that the place selected is (a) in a curve, (b) on a fill, (c) near a dirt road crossing, (d) between two trestles. It will be conceded that the ideal is always to be desired. This ideal would

call for a place where there is no curve, no fill, no crossing, and no trestle, but the fact remains that the ideal in railroading can rarely, if ever, be attained. In railroading one must face problems as he meets them. The rule laid down by the Mississippi Supreme Court touching connections between railroads is that one railroad may select a point for a connection with another railroad at any point on the other railroad's line that is reasonable and not unduly dangerous, taking into consideration the rights and interests of both railroads and the rights and interests of the public. See *Alabama & Vicksburg Railway Company, et al. v. Jackson & Eastern Railway Company*, 95 So. 733, and 101 So. 553.

Tested then by this rule, does the evidence in this case show that the place selected for a connection in this case is unreasonable and unduly dangerous, taking into consideration the interests of both parties? Some witnesses for plaintiffs in error made startling statements touching the dangers that would arise from the connection at the point selected, and plaintiffs in error set out said statement in their brief, and for emphasis, repeat them time and time again to this Court. One witness characterizes the point selected as a death-trap, and we think the witness was honest. His trouble was that he was laboring under a glaring mis-apprehension of the facts. The truth is, all of the witnesses for plaintiffs in error testified under two material mis-apprehensions touching the facts of the case. The first mis-apprehension is that the super-elevated outer rail of plaintiff's line around this curve would have to be lowered to conform to defendant's connecting line. The other is that defendant under its eminent domain application would be authorized to run its engines, cars and trains ad libitum

on to and over plaintiff's main line. We respectfully submit that both these positions are erroneous, and arise, doubtless, from a misunderstanding of the terms and conditions of defendants application for eminent domain and the rights of defendant thereunder. This application nowhere, as we submit, requires that the super-elevated outer rail on defendant's main line would have to be lowered. The fact is, it provides that the installation is to be made "under competent supervision, and in a workmanlike manner, in accordance with the standard practice of the Alabama & Vicksburg Railway Company." See application herein set out.

It is not difficult to understand the ominous dangers testified to by Evans, Graham and others, and the protests made by some of the employees of the Alabama & Vicksburg Railway Company when we understand that they testified under such grave mis-apprehensions of the true facts. If the application required the lowering of the super-elevated rail around the curve on the main line of plaintiffs in error and if the application authorized the use of the Alabama & Vicksburg Railway Company's main line by the Jackson & Eastern Railway Company at will, then we admit there would be danger, whether the Alabama & Vicksburg maintained its accustomed rapid operations at this point as shown by the testimony, or not. But the true facts are different. There will be no change in the super-elevated rail of the Alabama & Vicksburg Railway Company's main line. There will be no change in its line except the insertion of a switch, and no authority will be given to the Jackson & Eastern Railway Company to use any part of the main line of the Alabama & Vicksburg Railway Company. Its only authority and the only authority sought in its application for eminent do-

main, is to have the Alabama & Vicksburg Railway Company deliver to it and over this switch connection, such cars as shall come to it at this point from other lines, and, to receive from it such cars as are tendered at this point for transportation over the Alabama & Vicksburg and other lines. The Alabama & Vicksburg Railway Company will do the act of actually delivering the cars to the Jackson & Eastern and of receiving the cars from it with no right or authority on the part of the Jackson & Eastern Railway Company to enter the switch connection on to the main line of the Alabama & Vicksburg Railway Company.

It is true that plaintiffs in error insist in their brief that the ultimate purpose of the Jackson & Eastern Railway Company is to use the bridge, the main line, and depot facilities, of the Alabama & Vicksburg Railway Company, but we earnestly submit that no such purpose is disclosed by the petition for eminent domain. If it were true that the Jackson & Eastern Railway Company hoped in the future to work out a method by which it could economize expenditures of large sums of money by a joint use of the Alabama & Vicksburg facilities, it would have no bearing in this case, and in support of that proposition we cite the case of *Louisville & Nashville Railroad Company v. Western Union Telegraph Company*, 250 U. S. 363, 63 Lawyers' Ed. 1032. Should the Jackson & Eastern Railway Company in the future undertake to acquire the use of the property of plaintiffs in error, they would have their day in Court. The case above cited is pertinent and to the point.

Stripped then of all impertinent inquiries, and misapprehensions of fact, we have a situation left that would

not interfere with any train operated by the plaintiffs in error except such trains or engines as would be stopped at this switch connection for the purpose of interchanging cars. The alleged dangers from the curve, fill, dirt crossing, and trestles would have no application to any passenger train, and would effect no freight train except such local freight train as might stop to engage in the interchange of cars. The only possible added hazard would arise from having the switch on a curve, and under the proof in this case all railroads maintain switches on curves and on the outside of curves. This record shows four (4) such curves in less than one hundred miles of the place in question on the Alabama & Vicksburg Railway Company's main line, and the proof further shows that plaintiffs in error run their trains at a high rate of speed around such curves and over such switches, and it stands to reason that this would not be done if the hazard were great.

Touching the trains or engines that would stop at this switch to make interchange of cars, we submit that the hazard would not be enhanced to any material extent by the curve, the fill, or the dirt road crossing. In support of this statement see the testimony of Stacker, pages 299 to 303 of the record, and the testimony of Vick, pages 410 to 416 of the record.

The witness Vick had had broad experience as a switchman, as yard master, and as conductor on a freight train, and in his testimony he thoroughly demonstrates the various steps that would be taken in switching cars at this point for interchange, and from his testimony it clearly appears that neither the curve, the fill, nor the dirt road crossing is a material objection. He further demonstrates

that switching can be done with little, if any, interference from the trestles, and Mr. E. Ford, Assistant to the President of the Alabama & Vicksburg Railway Company and the Vicksburg, Shreveport & Pacific Railway Company, also shows in his testimony that any interference from the trestles could easily be remedied by the building of a plank walk. See Ford's testimony, page 376 of the record. We quote from Mr. Ford's testimony on direct examination:

"Q. It has been suggested that there could be provided walkways?

"A. You can do that.

"Q. Is it satisfactory?

"A. It can be done.

"Q. Is it satisfactory?

"A. This provides a place for them to walk.

"Q. Would that eliminate the objection?

"A. It would eliminate them having to walk over the cars.

"Q. Would it eliminate the objection to the trestles?

"A. They would have a place to walk, say if they had a walkway four feet long, four feet in width."

This witness finally, under pressure from counsel, stated that a walk would be very objectionable because the timbers would rot, but we submit that his proof shows conclusively that the walk could be provided, but whether the walks were provided or not, the testimony of Mr. Vick shows that the presence of these trestles would not be material objection in switching cars for the interchange tracks.

The Chancellor, at the request of counsel, visited the scene and made personal observations touching the flood water conditions, the curve, the fill, the dirt road crossing and the presence of the trestles, and after having heard the testimony of all the witnesses, found as a fact that the place selected was not an unduly dangerous place, and that the place selected was a reasonable place for the location of the interchange switch connection between these two roads. The Supreme Court of Mississippi, on review of this case, affirmed the finding of the Chancellor, and we submit that the affirmance by the highest court of our state is final and binding on plaintiffs in error.

We adopt and refer the Court to our brief filed on petition for a writ of certiorari. We earnestly submit that the writ of error should be dismissed or affirmed, and that the petition for writ of certiorari should be denied. All of which is respectfully submitted.

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MARCH 1ST, 1926.